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Supreme Court, U.S.
FILED
011012 NOV 29 2001
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No.

In the
Supreme Court of the United States

KENT J. ASHTON, *Petitioner*

v.

FEDERAL AVIATION ADMINISTRATON
CITY OF CONCORD, NORTH CAROLINA
Respondents

On Petition for Review of an Order of the
Federal Aviation Administration
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In cases involving employment discrimination and age discrimination, this Court requires that evidence and presumptions be evaluated according to a framework outlined in *McDonnell Douglas v. Green.*

The question is:
Whether the Federal Aviation Administration should apply the *McDonnell Douglas* framework when evaluating complaints of unjust discrimination at federally-funded airports under 49 U.S.C. § 47107(a)(1).

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	(i)
PARTIES TO THE CASE	(ii)
TABLE OF CASES AND AUTHORITIES	(iv)
OPINIONS BELOW	1
JURISDICTION	2
STAUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
WHY THE PETITION SHOULD BE GRANTED	5
I. The *McDonnell* framework for discriminatory treatment complaints insures correct evaluation of evidence and presumptions	5
II. The FAA's unfamiliarity with *McDonnell* led to incorrect presumptions and violation of Constitutional right	6
III. Adherance to *McDonnell* would put Constitutional rights and legal presumptions in focus for administrative agencies	14
CONCLUSION	18
APPENDIX	App. 1a-101i
INDEX TO APPENDIX	App. (i)

TABLE OF CASES AND AUTHORITIES

Cases:	Page
Addington v. Texas, 441 U.S. 418 (1979)	11
Bridges v. Wixon, 326 U.S. 135 (1945)	15
Coffin v. U.S., 156 U.S. 432 (1895)	7
Charlton v. F.T.C., 543 F.2d 903 (D.C. Cir. 1976)	13
City of Pompano Beach v. FAA, 774 F.2d 1529 (11th Cir. 1985)	12, 17
Collins Securities Corp. v. S.E.C., 562 F.2d 820 (D.C. Cir. 1977)	11
Colten v. Kentucky, 407 U.S. 104 (1972)	7
Cort v. Ash, 422 U.S. 66 (1975)	17
Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994)	11
Francis v. Franklin, 471 U.S. 307 (1985)	13
Hess v. Indiana, 414 U.S. 105 (1973)	15
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	passim
Mullaney v. Wilber, 421 U.S. 684 (1975)	13
Niswonger v. American Aviation, Inc., 411 F.Supp. 763 (E.D.Tenn. 1975)	17
Paulsen v. County of Nassau, 925 F.2d 65 (2nd Cir. 1991)	15
Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000)	6
St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993)	5, 6
Santosky v. Kramer, 455 U.S. 745 (1982)	11
Schware v. Board of Examiners, 353 U.S. 232 (1957)	9
State v. Sparrow, 276 N.C. 499, 173 S.E. 2d 897 (1970), cert. den. 403 U.S. 940	7
Texas v. Johnson, 491 U.S. 397 (1989)	15
U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983)	6, 16
In re Winship, 397 U.S. 358 (1970)	7

Woodby v. I.N.S., 385 U.S. 276 (1966) 11

Statutes and Regulations:

U.S. Constitution, Amendment 1 11
42 U.S.C. §1983 12
49 U.S.C. §40103(e) 17
49 U.S.C. 47107(a)(1) 5, 6, 17
F.R.Evid.Rule 402 8
14 C.F.R. §16.23(a) 6
14 C.F.R. §16.229 12
N.C.G.S. §7A-196 7

Miscellaneous:

61A Am.Jur.2d, Privacy, §107 15
86 A.L.R.3d 374, §4 15

In the

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No. ____

Kent J. Ashton, *Petitioner*

v.

Federal Aviation Administration
City of Concord, North Carolina
Respondents

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL AVIATION ADMINISTRATION TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for a Writ of Certiorari

Petitioner Kent J. Ashton respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals is unpublished but reproduced here at App., *infra*, 1a-3a. The Final Decision and Order of the Federal Aviation Administration is unpublished but reproduced here at App., *infra*, 4b-50b. The Federal Aviation Administration's Director's

Determination is unpublished but reproduced here at App., *infra*, 51c-80c.

JURISDICTION

The Final Decision and Order of the Federal Aviation Administration was entered on April 17, 2001. App., *infra*, 50b. The Court of Appeals, exercising jurisdiction pursuant to 49 U.S.C. § 46110(a), denied a petition for review of the Federal Aviation Administration's Order by order entered on September 20, 2001. App., *infra*, 1a-3a

The jurisdiction of this Supreme Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional provisions are set out at App., *infra*, 81d.

The pertinent statutory provisions are reproduced as follows:

The Federal Aviation Act of 1958, Pub. L. No. 85-726, Title III, 72 Stat. 731, §308(a) (1958) as amended. Cf. 49 U.S.C. §40103(e) (codification) is reproduced at App., *infra*, 82e;

The Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, Title V, 96 Stat. 671, 676 (1982) as amended. *Cf.* 49 U.S.C. §47107(a) (codification) is reproduced at App., *infra*, 82e-83e.

The pertinent regulatory provision, Code of Federal Regulations, Title 14, Part 16, Subpart F, Section 16.229(b), *Cf.* 14 C.F.R. §16.229 is reproduced at App., *infra*, 84f.

STATEMENT OF THE CASE

Petitioner Ashton stored his aircraft on the federally-funded Concord Regional Airport. The

City of Concord, North Carolina is the owner and airport Sponsor. Ashton objected to the management practices of the Airport and filed several complaints with various government agencies. To gather public support for his complaints, Ashton sought other aircraft operators' opinions as he flew and maintained his aircraft on the Airport. App., *infra*, 86g-87g.

Ashton was prohibited by the terms of his municipal hangar lease from working on his aircraft in his leased hangar, however, he observed that others tenants similarly constrained, worked in their leased hangars. App., *infra*, 100i, 94g. Ashton photographed two of these tenants and complained to the City's Aviation Director. The two tenants cross-complained that Ashton bothered them. *Id.*, 94g, 101i, 14b.

The Aviation Director responded to Ashton's investigations and the two tenants' complaints by restricting Ashton's movement about the Airport. App., *infra*, 90g-91g, 14b. As Ashton continued to observe Airport activities, the Aviation Director tightened Ashton's constraints, restricting him to a path between his hangar and an Airport gate. *Id.*, 90g. Finally, airport authorities observed Ashton speaking with another tenant about his airport concerns and warned him again about straying from his path. Later that day, when Ashton walked to the Airport terminal to pay a fee for his use of an aircraft service facility, the Airport manager summoned city police who cited him for trespass on the Airport. *Id.*, 91g, 14b. See also *Certified Record*, Case No. 01-1562, Item 4, Exhibit 7, p. 2.

Ashton was initially convicted of trespass in a district court but gave notice of appeal for trial de novo. App., *infra*, 87g, 14b. After eight months, the charge was dismissed. *Id.*, 14b n.6. In the interval between Ashton's conviction and the subsequent *nolle prosequi*, the City determined that Ashton's

"conviction" gave the City grounds to evict Ashton from his leased hangar. *Id.*, 87g. The City refused to grant Ashton a hearing on the eviction by the four "disinterested citizens"[1] required by its Airport Code. *Id.*, 88g. The City evicted Ashton from his leased hangar but then went further to evict Ashton and his aircraft from the entire Airport--and by default, to evict his wife, a half-owner of the aircraft. *Id.*, 95g. The City refused to allow Ashton and his wife to base their aircraft at the federally-funded Airport under any circumstances. *Id.*, 97h.

Ashton filed the instant complaint with the Federal Aviation Administration (FAA), objecting to the eviction, and objecting on behalf of his wife. In the agency's initial Director's Determination (App. C, *infra*), the Director of Airport Safety and Standards held that Ashton was guilty of criminal trespass, notwith-standing that Ashton awaited a new jury trial. *Id.*, 75c, 77c. The "conviction", the FAA held, supported the Sponsor's argument that Ashton did not abide by the terms of his hangar permit. *Id.*, 77c. Ashton appealed the Director's Determination to the Associate Administrator for Airports. By this time, the criminal charge against him had been dismissed. *Id.*, 40b n.16, 44b. In its Final Decision and Order, the FAA found that even though the charge against Ashton was dismissed, the accusation supported the City's argument that Ashton engaged in "non-aeronautical behavior"--i.e., violation of Airport rules (*Id.*, 24b, 38b, 41b, 44b), which, the FAA said, the Sponsor was not required by to accommodate by its Grant Agreement. Therefore, the Agency found that Ashton's eviction was reasonable and not unjustly discriminatory. Id. 32b, 35b, 48b-49b.

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[1] The Complaint said "five disinterested citizens". The correct number is, however, four.

The 4th Circuit Court of Appeals, exercising jurisdiction pursuant to 49 U.S.C. §46110(a) (1994) denied Ashton's petition for review by per curiam opinion. App., *infra*, 1a-3a.

WHY THE PETITION SHOULD BE GRANTED

I. The McDonnell framework for discriminatory treatment complaints insures correct evaluation of evidence and presumptions.

The Court should grant the petition for certiorari because the case demonstrates substantial violation of fundmental rights arising from the FAA's failure to adhere to the *McDonnell Douglas*[2] framework for evaluating evidence and presumptions in "unjust discrimination" cases under the Airport and Airway Improvement Act (49 U.S.C. §47107(a) *et seq.*), i.e., the same framework our courts now employ to evaluate employment discrimination and age discrimination claims under other federal anti-discrimination acts.[3]

The *McDonnell* framework functions to evaluate if there is discrimination for an unlawful reason. *McDonnell*, 800, *passim*. This protocol is explained more fully in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).[4] First, a complainant must make a

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[2] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[3] Employment discrimination: the Civil Rights Act of 1964, § 703(a)(1) (42 U.S.C. § 2000e-2(a)(1)); age discrimination: the Age Discrimination in Employment Act (29 U.S.C. § 621, *et. seq.*). In *Reeves v. Sanderson*, 530 U.S. 133 (2000), the court assumed "arguendo" that the *McDonnell Douglas* framework for evaluating employment discrimination also applied to age discrimination claims. *Reeves*, 142.

[4] Ashton argued the elements of a *Hicks*-based claim with the FAA. See *Certified Record*, Case 01-1562, Item 12

prima facie case for discrimination. *Id.*, 506. Second, such prima facie case shifts the burden to the respondent to produce evidence to rebut the complainant's prima facie case. *Id.*, 506-507. Third, if rebutting evidence is produced, the plaintiff must be afforded the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were not its true reasons, but were a pretext for unlawful discrimination. *Hicks*, 507-508, 515; *accord, Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000). The respondent's rebutting evidence must be admissible and show that discrimination was for a legitimate reason. *E.g., Reeves*, 142. Fourth, the finder-of-fact must assess the rebuttal evidence to determine if the reasons given are legitimate reasons. *Hicks, Id.* If the reasons are not legitimate, the complainant's prima facie case may prevail. *Reeves*, 148.

However, "the ultimate question [is] discrimination *vel non*." *Hicks*, 518 (quoting *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983)).

II. The FAA's unfamiliarity with McDonnell led to incorrect presumptions and violation of Constitutional right.

Sponsors of federally-funded airports may not unjustly discriminate against public airport users. 49 U.S.C. §47107(a)(1), App. E, *infra*.

Ashton brought a complaint under 14 C.F.R. §16.23(a)[5] to contest his and his wife's eviction from the federally-funded public airport. In response to

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[Complainant's Appeal]. He argued *Hicks* itself in his brief to the 4th Circuit.

[5] "A person directly and substantially affected by any alleged non-compliance [with Grant Agreement Assurances] may file a complaint with the Administrator."

his administrative complaint, the airport Sponsor accused Ashton, *inter alia*, of criminal behavior, alleging that he criminally trespassed on the Airport. The FAA, as trier of fact, was required to afford him a presumption of innocence of criminal behavior until he was shown to be guilty. *Coffin v. U.S.*, 156 U.S. 432, 453 (1895) (calling the presumption of innocence "the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of . . . our criminal law."); *accord, In re Winship*, 397 U.S. 358, 362. (1970).

Ashton was convicted before a district court judge and appealed for jury trial de novo. This Supreme Court has held that in a two-tiered appellate system such as North Carolina employs, convictions in district court which are appealed from for trial de novo are annulled. *Colten v. Kentucky*, 407 U.S. 104, 113 (1972) ; *State v. Sparrow*, 276 N.C. 499, 507, 173 S.E.2d 897, 902 (1970), cert. den. 403 U.S. 940 ("The judgement appealed from is completely annulled and is not thereafter available for any purpose". [internal citations omitted]).[6]

Nevertheless, the FAA accepted and relied upon the Sponsor's rebuttal evidence that Ashton was convicted of criminal trespass, in spite of the fact that he awaited a new jury trial on the charge:

> Subsequently, Complainant was convicted of trespassing by the Cabarrus County District Court. [internal citation omitted] App., *infra*, 65c.
>
> * * *

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[6] *Cf.*, N.C.G.S. §7A-196 (2001). ("In criminal cases there shall be no jury trials in the district court. Upon appeal to the superior court, trial shall be de novo, with jury trial as provided by law.").

> While Mr. Ashton argues that he was evicted in retaliation for the complaints he filed with the FAA, we are persuaded that the City may have had sufficient cause to exercise the lease termination provision at issue. Specifically, the record reflects that Mr. Ashton was arrested and convicted for criminal trespass at the Airport.
>
> Mr. Ashton's conviction, while not an issue with the jurisdiction [of the FAA], supports the City's argument that Mr. Ashton failed to abide by the terms and conditions of his Aircraft Storage Permit. Specifically, . . . that permittees must abide by, . . ., airport rules and local ordinances. *Id.*, 76c-77c.
>
> * * *
>
> The FAA also accepts *as we did in our consideration of Mr. Ashton's previous complaint*, that violations of state or local law by an individual might have the effect of restricting his . . . ability to conduct aeronautical activities. [emphasis added] *Id.*, 77c.

Because the State's case against Ashton had not been proven, evidence of a conviction was inadmissible. F.R.Evid.Rule 402. Accordingly, the FAA's reliance on the inadmissible evidence was counter to *McDonnell* and unfairly prejudiced the agency's initial finding against Ashton.[7]

Later, when the charge against Ashton was dismissed by the State, the FAA judicially noticed

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[7] The issue of unfair prejudice was raised and argued to the FAA and again in the Court of Appeals. See, *Certified Record*, Case No. 01-1562, Item 12, and Petitioner's Informal Brief to the Court of Appeals.

the dismissal (App., *infra*, 14b n.6), however the FAA continued to hold that the mere accusation indicated that Ashton was guilty of improper, if not criminal, behavior. *Id.*, 42b n.18. Relying now on the dismissed criminal charge, the FAA's Associate Administrator denied Ashton's appeal.

> I further find that it was appropriate for the Director to have relied on the September 20 [alleged trespass] incident . . . [because] what the Director actually relied upon was Mr. Ashton's noncompliance with airport rules and regulations, for which he may or may not have been subject to arrest. . . ., "Mr. Ashton's conviction . . . supports the City's argument that Mr. Ashton failed to abide by the terms and conditions of his Aircraft Storage Permit." [quoting again the initial Director's Determination] App., *infra*, 40b-41b.
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> * * *
>
> [I]t is not relevant that his charges were eventually dismissed . . .. [T]he September 20 [alleged trespass] incident is only relevant in that his conduct leading up to the arrest provides yet another example of Complainant's violation of the airport's rules and regulations. [internal footnote omitted] App., *infra*, 41b-42b.

However, the mere fact that a man has been arrested has very little, if any, probative value in showing that he engaged in any misconduct. *Schware v. Board of Examiners*, 353 U.S. 232, 241 (1957) (calling dismissed arrest records "no more than gutter rumors when measured against any standard of Constitutional fairness" [Frankfurter, J,

with Justices Harlan, and Clark concurring at n.25)]. Moreover, it was clearly relevant that the charge was dismissed; it demonstrated that the Sponsor's accusations were unsubstantiated and supported Ashton's retaliation claim. Applying *McDonnell*, the correct inference is that the Sponsor's reasons were a pretext to unjustly discriminate.

Why did the Agency cling to the criminal presumption against Ashton? The FAA had already accepted that Ashton committed criminal trespass in its findings in an earlier complaint. See App. *infra*, 25b n.8.[8] The earlier 14 C.F.R. §16 action was on petition for review in the Court of Appeals and held in abeyance pending the FAA's decision in the instant complaint. Subsequently it would be consolidated with this case.[9] With the Court of Appeals poised to review both cases, the FAA likely sought to appear consistent. To acknowledge now that the accusation was meritless would cast doubt on its earlier ruling; yet now, it was clear Ashton was innocent of criminal behavior.

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[8] In *Ashton v. City of Concord*, FAA Airport Proceedings Docket No. 16-99-09, Final Decision and Order, January 28, 2000, the FAA held with regard to the same trespass charge: [C]onflict over the activities . . . resulted in the citation of the Complainant for trespassing on September 20, 1999, by the Concord Police Department (at p. 16).

. . .

"The FAA accepts that violations of state of [sic] local law by and individual, and subsequent prosecution, might have the effect of restricting his or her ability to conduct aeronautical activities." (at p. 25).

[9] The Court of Appeals placed Ashton's petition for review of the earlier Part 16 action in abeyance pending the FAA's decision in the second Part 16 action. After Ashton petitioned also for review of the second Part 16 action, the Court of Appeals consolidated the two petitions by order dated May 1, 2001.

Moreover, in the administrative forum, the Sponsor was required to prove Ashton's unlawful behavior by the "clear and convincing" standard of proof. *E.g., Woodby v. I.N.S.*, 385 U.S. 276, 284 (1966) (because liberty interests were implicated, clear and convincing standard of proof required in hearing over whether person should be deported) modified by *Addington v. Texas*, 441 U.S. 418, 433 (1979); *accord, Collins Securities Corp. v. S.E.C.*, 562 F.2d 820 (D.C. Cir. 1977) (in administrative determinations where fundamental rights are involved, clear and convincing standard of proof required). *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (fundamental parental rights severed only on clear and convincing standard of proof).

The Sponsor's continued assertion that Ashton engaged in unlawful and improper behavior, in the face of a *nolle prosequi* and the presumption of innocence, shifted the burden of proof to the Sponsor to prove criminal or improper conduct. *E.g., Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 273 (1994) (once the party with the burden of production establishes a prima facie case, the burden to "produce evidence" shifts).

What then, was Ashton's prima facie case? Ashton alleged that as an aircraft owner and pilot, he was a bona fide aeronautical user evicted from the public airport (App., *infra*, 88g); that he engaged in First Amendment speech about public concerns in a designated public forum--the public airport (*Id.*, 86g, 94g); that the Sponsor restricted his access to the Airport in retaliation for his protected complaints, to curtail his speech with other tenants, and to prevent his observations of Airport management practices. See *Certified Record*, Case No. 01-1562, Item 5, p. 5 *et seq.*). He alleged that he was evicted from the airport after a hearing which did not

comply with procedural due process[10] (App., *infra*, 88g), and evicted in retaliation for exercise of his Constitutional rights in violation of 42 U.S.C. § 1983 (*Certified Record, Id.).* He alleged that his wife was denied her federal airport entitlement without due process.

Ultimately, he alleged that the Sponsor refused him and his wife an aeronautical privilege--aircraft storage--that it granted to others, i.e., he alleged a violation of the exclusive rights provision of federal aviation law. See, *e.g., City of Pompano Beach v. FAA*, 774 F.2d 1529, 1541 (11th Cir. 1985).

Because the FAA was unfamiliar with the *McDonnell* framework, it misunderstood the burden-shifting effect of a prima facie case. The agency relied simplistically on a "preponderance of evidence" standard for general administrative adjudications. See, 14 C.F.R. § 16.229, App. F, *infra*. While Ashton ultimately had to fulfill that burden of persuasion, the Sponsor's rebuttal evidence generated presumptions that burdened the Airport Sponsor. By failing to understand presumptions and burden-shifting, the FAA incorrectly held that Ashton had to prove his prima facie case, as well as his innocence, to the Agency:

> The Acting Associate Administrator finds that the burden of proof issue is not justiciable here. Also, this burden of proof issue is irrelevant. App., *infra*, 33b, See also 32b-35b for the Agency's discussion of burden-shifting)

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[10] The Airport Code's requirement for a hearing by "four disinterested citizens" was denied by the Sponsor. Ashton's case was heard by an Assistant City Manager. App., *infra*, 88g. The FAA declined to determine if due process was met (*Id.*, 30b-32b (declining to determine the various Constitutional issues)). Nevertheless, the Agency accepted the hearing's outcome, i.e., that the Airport could evict Ashton and his wife.

* * *

> Once again, the Complainant states that the Director had to prove unlawful or improper non-aeronautical activity in order to find the facts to dismiss the case. This is incorrect. The circumstances that the Complainant alleges require additional proof are not related to Mr. Ashton's use of the airport as an airport . . ..
>
> It is the Complainant's responsibility to substantiate that the City has, in fact, . . . unjustly discriminated against him. *Id.*, 35b.

The FAA's demand that Ashton prove his innocence by a preponderance of evidence was itself reversible error. *E.g.*, *Charlton v. F.T.C.*, 543 F.2d 903, 908 (D.C. Cir. 1976) (mistake by administrative agency in applying the correct burden of proof held to be reversible error); See, *e.g.*, *Mullaney v. Wilber*, 421 U.S. 684, 701 (1975) (state law requiring defendant to prove a mitigating claim by a preponderance of the evidence affirmatively shifted the burden of proof to the defendant in violation of due process clause of the 14th Amendment), *Francis v. Franklin*, 471 U.S. 307, 315 (1985) (jury instruc-tions which shift burden of persuasion to criminal defendant to prove a crucial element of intent, infringed on due process.).

As an example of how constitutionally protected behavior was misrepresented as improper "non-aeronautical behavior", the Sponsor alleged that the exchange between Ashton and tenant Morris was harassment of Morris. App., *infra*, 13b, 64c. The FAA accepted the incident as evidence of an act of harassment. *Id.* Yet the affidavit of a neutral witness in the record (*Id.*, 99i) clearly demonstrates that Ashton did nothing more than question Morris

about Morris' rule-breaking, and take Morris' photograph when he declined to stop (at Id., 100i). Photographing Morris in the act of breaking the Airport rules angered Morris, who then threatened Ashton. For this, Ashton was evicted, while the Airport took no action against the rulebreaker, Morris.

Accordingly, the FAA's assessment of this evidence ignored a presumption of constitutionality of public speech. Constitutional principles did not concern the FAA ("[The FAA finds] that the question of whether or not Mr. Ashton's nonaeronautical activity was constitutionally protected is not within the jurisdiction of the FAA." App., *infra*, 31b).

III. Adherence to McDonnell would put Constitutional rights and legal presumptions in focus for administrative agencies.

If the FAA had applied a *McDonnell* framework to Ashton's discrimination claim, it likely would have considered the Constitutional rights at stake. To illustrate:

In answer to Ashton's prima facie case, the Sponsor admittedly fulfilled its burden of production with the evidence that he was convicted of trespass, that he bothered other tenants, took pictures of people without their permission, made himself a nuisance, and entered private leaseholds.

However, Ashton was then permitted to prove by a preponderance of evidence that the Sponsor's rebutting evidence was not legitimate, or inadmissible, or a pretext for unjust discrimination. *Hicks*, *Reeves*, *supra*. Accordingly, Ashton showed that

- The "trespass" allegation had been dismissed.[11] He must be presumed innocent.
- The "bothered other tenants" allegation was nonsense. See, *e.g.*, *Texas v. Johnson*, 491 U.S. 397, 408-409 (1989) (free speech serves its best purpose when it stirs people to anger), *Hess v. Indiana*, 414 U.S. 105, 107 (1973) ("To shut off discourse [requires] a showing that substantial privacy interests are being invaded in an essentially intolerable manner."), *Paulsen v. County of Nassau*, 925 F.2d 65, 71 (2nd Cir. 1991) (listener's reaction to protected speech does not constrain such speech).
- The "taking pictures of people without permission" allegation was not actionable. See, *e.g.*, 86 A.L.R.3d 374, §4; 61A Am.Jur.2d, Privacy, § 107.
- The "made himself a nuisance" allegation was unsupported in federal aviation law; no definition of "nuisance"--not even the State's nuisance statute--was employed; the FAA merely accepted the Sponsor's conclusory statement that it believed Ashton's behavior was nuisanceful. Moreover, Ashton showed that until he complained, the Sponsor had no objection to his behavior.
- The "entered private leaseholds" allegation was rebutted by Ashton's strict denials, a corresponding presumption of innocence, failure of any private party to allege trespass in the record, and the FAA's refusal to apply common-law tests for trespass (*Id.*, 44b).
- Hearsay implicating his fundamental rights was inadmissible in the administrative hearing. *Bridges v. Wixon*, 326 U.S. 135, 155-156 (1945).

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[11] The State itself was burdened to prove that a pilot, aircraft owner, and permit-holder, who benefited from a Grant Agreement demanding public access, was indeed trespassing on the Airport. Note however, that the FAA interprets the State's dismissal as evidence that Ashton was probably guilty. App., *infra*, 14b n.6.

• Finally, Ashton showed that his speech and complaints were Constitutionally protected, and that the eviction was likely made as a pretext to stop his complaints.

A complainant carries his burden to persuade the trier of fact if he shows "that the [defendant's] proffered explanation is unworthy of credence." *Aikens*, 718 [Blackmun, J, joined by Justice Brennan, concurring]. However, the case did not reach this stage of the *McDonnell* framework. The FAA failed to recognize that the criminal trespass evidence was inadmissible; it held that it did not have to apply common-law principles for proving trespass, nuisance and other alleged improper behavior or that the Sponsor should prove them by the "clear and convincing" standard. It held that lawful--even Constitutionally protected--behavior, i.e., speech, investigations and photography, were unlawful. Ultimately, by holding that it had no jurisdiction to assess the Constitutional claims, the FAA skirted the issue of whether the Sponsor's eviction of the Ashtons was a pretext to prevent Mr. Ashton's First Amendment complaints.

For the first time, here, the FAA employs a concept of "non-aeronautical behavior." App., *infra*, 26b n.9, 30b-31b. The concept operates here as a subjective legal standard. Virtually any otherwise-Constitutional conduct on an airport which government might disfavor could be held to be "non-aeronautical behavior" and limitable. Accordingly, this standard gives government an unfettered power to exclude persons, based on the government's own subjective view of what behavior is proper.

The FAA previously relied on a standard of recognized "aeronautical activities" in judging such cases. If a party sought to pursue a recognized aeronautical activity, all things being equal, the aeronautical activity must be accommodated at the

federally-funded airport. See, *e.g.*, *Pompano Beach, supra, Niswonger v. American Aviation, Inc.*, 411 F.Supp. 763, 766 (E.D.Tenn. 1975) modified on other grounds by *Cort v. Ash*, 422 U.S. 66 (1975).

Here, the FAA abandons its previous "aeronautical activity" standard. The evidence showed that Ashton sought to pursue aeronautical activities of (1) storing, (2) repairing, and (3) flying his aircraft from the Airport; the Sponsor denied him and his wife the right to engage in those recognized aeronautical activities. Even accepting the FAA's rationale ("[T]he prohibition against the granting of an exclusive right [under §40103(e)] only applies to aeronautical activity. It does not protect . . . nonaeronautical activity." App., *infra*, 46b), the FAA ignored substantial evidence that the Sponsor granted operator rights to other tenants that it denied to the Ashtons, i.e., unlawful exclusive rights. Accordingly, the FAA did not understand what constitutes a "prima facie case", according to *McDonnell*.

If the decision is allowed to stand, Sponsors of federally funded airports will be permitted to curtail speech, petition, and public investigation on public airports, as it has done here, by holding them out to the FAA as "non-aeronautical behavior". Moreover, if it is accepted that federal airport privileges may be withdrawn from those who are adjudged bothersome, airport sponsors will be empowered to punish complaining tenants by alleging that they "bothered" others. The application of this standard would overrule Constitutional protections.

FAA adherence to the *McDonnell* framework would act to prevent incorrect presumptions of law and impart rigor to the Agency's assessment of discriminatory treatment evidence heard in airport complaint matters.

CONCLUSION

For the foregoing reasons, the Court should issue its Writ of Certiorari to review this case.

Respectfully submitted,

Kent J. Ashton (pro se)
Petitioner
6270 Lynwood Drive
Concord, N.C. 28027-2912
(704) 784-1874

INDEX TO APPENDIX

	PAGE
Per Curiam Opinion, 4th Circuit Court of Appeals	1a-3a
Final Decision and Order, Federal Aviation Administration	4b-50b
Director's Determination, Federal Aviation Administration	51c-80c
Constitutional Provisions	81d
United States Code	82e-83e
Code of Federal Regulations	84f
Complaint	85g-96g
City of Concord Letter [Complainant's Reply, Exhibit X]	97h-98h
Affidavit of Neil Stewart [Complainant's Reply, Exhibit Y]	99i-101i

APPENDIX A

[Filed: September 20, 2001
Clerk, Court of Appeals for the 4th Circuit]

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-2134

KENT J. ASHTON,
Petitioner,

versus

FEDERAL AVIATION ADMINISTRATION;
CITY OF CONCORD, NORTH CAROLINA,
Respondents.

No. 01-1562

KENT J. ASHTON,
Petitioner,

versus

FEDERAL AVIATION ADMINISTRATION;
CITY OF CONCORD, NORTH CAROLINA,
Respondents.

On Petition for Review of Orders of the Federal Aviation Administration.
(16-99-09, 16-00-01)

Submitted: September 13, 2001 Decided: September 20, 2001

Before WIDENER and WILLIAMS, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Petitions denied by unpublished per curiam opinion.

Kent J. Ashton, Petitioner Pro Se. Kenneth P. Quinn, Frank San Martin, FEDERAL AVIATION ADMINISTRATION, Washington, D.C.; Anthony Alan Yang, Michael Jay Singer, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Keith J. Merritt, David Betts Hamilton, KILPATRICK STOCKTON, L.L.P., Charlotte, North Carolina, for Respondents.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

In these consolidated proceedings, Kent J. Ashton filed two petitions for review of final agency decisions issued by the Associate Administrator for Airports for the Federal Aviation Administration. We have reviewed Ashton's arguments, the record, and the orders issued by the Director, Office of Airport Safety and Standards, and the Associate Administrator and find no reversible error. Accordingly, we deny the petitions for review. We deny motions to strike informal briefs and grant Ashton's motion to file a corrected informal brief. We dispense with oral argument because the facts

and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITIONS DENIED

APPENDIX B

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

Kent J. Ashton *Complainant*	)	
v.	)	Docket No. 16-00-01
City of Concord, N.C. *Respondent*	)	

FINAL DECISION AND ORDER

INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) as an Appeal by Kent J. Ashton of the Director's Determination (DD) issued on October 16, 2000 by the Director of the FAA Office of Airport Safety and Standards, pursuant to the Rules of Practice for Federally-Assisted Airport Proceedings, 14 CFR Part 16 (FAA Rules of Practice).

The Complaint by Kent Ashton (Complainant), filed on January 28, 2000, raised the following issues for FAA consideration:

(1) Whether the Respondent, by terminating the Complainant's Aircraft Storage Permit for use of public T-hangar facilities at the Concord Regional Airport, is in violation of 49 U.S.C. 47107 (a)(l) and FAA grant assurance #22 regarding reasonable access to a public use airport without unjust economic discrimination.

(2) Whether the Respondent violated Complainant's due process liberty interests as protected by the Fourteenth Amendment of the United States Constitution. [FAA Exhibit 1, Item 12, page 3]

With respect to the allegations presented in this Complaint, under the specific circumstances at the Concord Regional Airport as discussed below, and based on the evidence of record in this proceeding, the DD concluded that the City was not currently in violation of its Federal obligations. Furthermore, the DD determined that the FAA does not have the jurisdiction to decide the Complainant's alleged violations of the Fourteenth Amendment to the United States Constitution. [FAA Exhibit 1, Item 12, page 17]

On November 3, 2000, Kent J. Ashton appealed the DD in accordance with FAA Rules of Practice. The Complainant presents numerous objections to the judgment of the Director, but does not present new evidence. The Acting Associate Administrator will discuss the specific objections in the "Analysis and Discussion" Section below. Also, the Complainant cites, as deficiencies of the DD, omissions of analysis of issues that he had not clearly alleged or argued in his Complaint.

As stated in his Appeal, Mr. Ashton presents the following grounds for his appeal of the DD to the Acting Associate Administrator:

> "a. The Director failed to apply mandatory presumptions that the exercise of First Amendment rights cannot be the basis for denial of use of a federally funded airport and that retaliation under color of law for exercise of Constitutional right is prima facie unlawful.

b. ... the agency improperly declined to investigate the Complaint in light of the presumptions of constitutional and civil rights law and failed to find the facts.
c. ... the agency failed to recognize that when fundamental rights are implicated, government, i.e., the Sponsor and the FAA, incur a burden-of-proof to show that Ashton's fundamental rights were curtailed for a compelling governmental purpose.
d. The Director admitted and relied upon inadmissible evidence: The agency admitted evidence of a criminal action under appeal and relied upon it, improperly, to show the truth of allegations in this civil action. It also admitted and relied on inadmissible hearsay. This was harmfully prejudicial to Ashton's case.
e. Many of the Agency's sub-findings, by way of which it reached the overall conclusion, were made arbitrarily and capriciously, or were contrary to law, made without observance of procedure required by law or harmfully prejudicial to Complainant's case."[1] [FAA Exhibit 1, Item 13, page 1]

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[1] Included in this section are two additional issues. The Complainant discusses in his Appeal the issue of his spouse having been unjustly denied access. However, the spouse is not a party to the Complaint, nor did the Complainant present any evidence in his pleadings of the spouse's ability or inability to use the Airport as an airport. (FAA Exhibit 1, Item 13, page I] Also, the Complainant argues on Appeal that the "Director failed to determine if the Sponsor's treatment of Ashton compared to its other tenants was disparate so as to create the grant of an exclusive right to the other tenants." [FAA Exhibit 1, Item 13, page 1] The Complainant did not raise the Exclusive Rights issue in his pleadings to the Complaint. Under Part 16 and Federal law generally, the complainant must raise all issues at the complaint stage. 14 C.F.R 16.23. However, since the exclusive rights prohibition was raised by

In accordance with 14 CFR Part 16 §33, the FAA has reexamined the entire record to reassess the findings in the DD. Upon an appeal of a Director's Determination, the Acting Associate Administrator must determine whether (1) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (2) each conclusion of law is made in accordance with applicable law, precedent, and public policy. Based on this reexamination, the FAA affirms the DD, which found the City of Concord had not violated 49 U.S.C. 47107(a)(1) or the FAA grant assurance #22, and that the FAA does not have the jurisdiction to decide the Complainant's alleged violation of the Fourteenth Amendment to the United States Constitution. Also, the FAA dismisses the allegation, raised on Appeal, of the granting of an exclusive right in violation of 49 U.S.C. 40103(e) or FAA grant assurance #23.

This Final Decision and Order finds that the Appeal did not contain persuasive arguments sufficient to reverse any portion of the DD.

Airport

Concord Regional Airport (CRA) is a public-use, general aviation airport located in Cabarrus County, North Carolina, approximately 7 miles west of Concord, North Carolina. The City of Concord owns the Airport. The Airport has approximately 88 based aircraft and 55,250 operations annually at the Airport. [FAA Exhibit 1, Item 1]

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the Complainant in his 1999 Complaint; since the Complainant's 2000 Complaint is a continuation of his prior Complaint factually; and since Complainant is not represented by counsel, we do address the exclusive rights allegation in this decision.

Concord Regional Airport opened in 1994 as a reliever airport to Charlotte/Douglas International Airport. The development of the Airport has been financed, in part, with funds provided to the City as the Airport sponsor under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq.*, and as administered by the State of North Carolina in the State Block Grant Program. [FAA Exhibit 1, Item 2]

Procedural History

A. Prior Complaint (16-99-09)

On July 12, 1999, Kent J. Ashton filed a formal complaint (FAA Docket No. 16-99-09), separate and before this proceeding, pursuant to 14 CFR Part 16, alleging that the City of Concord, as sponsor of the Concord Regional Airport, had violated its airport grant agreements and had engaged in economic discrimination and had granted an exclusive right. The complaint alleged that the City violated FAA grant assurances by: discriminating against his type, kind, or class of aeronautical use; by operating to prevent him from performing services on his own aircraft; by operating to restrict use of the Airport to favored types, kinds, or classes of aeronautical use, through a system of rules, regulations, lax enforcement, selective enforcement and special concessions; by requiring him to carry liability insurance for use of the Airport; by requiring him to make the City an additional insured on his liability insurance coverage; by requiring him to waive rights to recover damages against the City before being permitted to base an aircraft at the Airport; and by prohibiting tenants of T-hangars from storing

more than one aircraft in the hangar. [FAA Exhibit 1, Item 8]

On January 28, 2000[2], the FAA issued a Director's Determination, Docket #16-99-09, finding that the Concord Regional Airport was not in violation of its grant assurances pursuant to 49 U.S.C. section 40103(e) and 49 U.S.C. section 47107(a)(1) through (6). The Director considered the following issues raised by the Complainant in that prior Complaint: (i) Whether the City's regulations, standards or facilities constituted an unreasonable denial of access; (ii) Whether the City's rules, regulations, enforcement thereof, and allegedly disparate facilities create unjust economic discrimination by preferring some similarly situated aeronautical users over other aeronautical users; and (iii) Whether the City has bestowed an exclusive right to two private operators by providing increased convenience for the conduct of self-maintenance within a leased hangar, as well as bestowing an exclusive right for the Airport's Fixed-base operator (FBO) by effectively prohibiting self service for some. With respect to the allegations presented in Mr. Ashton's Complaint under FAA Docket No. 16-99-09, based on the record evidence in that proceeding, we found that the City, as the airport sponsor, was not in violation of its Federal obligations. [FAA Exhibit 1, Item 8]

On February 24, 2000, Mr. Ashton filed an appeal of the Director's Determination regarding his previous Complaint, (Docket No. 16-99-09), with the FAA's Acting Associate Administrator for Airports. In his appeal, Mr. Ashton alleged that ".. .the Director made procedural errors in the conduct of the investigation

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2 The same day that the FAA received Mr. Ashton's second Complaint at issue here.

and substantive errors in interpreting the evidence and making conclusions from the evidence." [FAA Exhibit 1, Item 9]

On July 3, 2000, the Acting Associate Administrator issued a Final Agency Decision with respect to Mr. Ashton's previous Complaint, FAA Docket No. 16-99-09, affirming the Director's Determination of January 28, 2000. The Acting Associate Administrator determined that ". . . the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent and FAA policy." [FAA Exhibit 1, Item 9, p. 23]

On August 30, 2000, Mr. Ashton filed a petition for review of the Final Agency Decision in the first proceeding (16-99-09) with the United States Court of Appeals for the 4th Circuit.[3]

B. Present Complaint (16-00-01)

On January 28, 2000, Kent Ashton filed a second Complaint (FAA Docket No. 16-00-01), which commences the instant proceedings. [FAA Exhibit 1, Item 3]

On February 17, 2000, the FAA issued a Notice of Docketing advising that it was docketing the instant Complaint. [FAA Exhibit 1, Item 4] Notwithstanding the fact that Mr. Ashton's instant Complaint (FAA Docket 16-00-01) contained many of the same issues as his previous complaint (FAA Docket No.

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[3] The Department of Justice, representing the FAA, did not object to a motion made by Mr. Ashton to the U.S. Court of Appeals for the Fourth Circuit to hold his petition regarding FAA Docket No. 16-99-09 in abeyance until such time as all administrative remedies regarding the instant complaint (FAA Docket No. 16-00-01) have been exhausted.

16-99-09), the FAA docketed the instant complaint only because the Respondent's termination of Mr. Ashton's Aircraft Storage Permit was not at issue in Mr. Ashton's previous complaint.[4]

On March 17, 2000, the City filed an Answer and Motion to Dismiss to the instant Complaint, FAA Docket No. 16-00-01. [FAA Exhibit 1, Item 5]

On March 27, 2000, Mr. Ashton filed a Reply to the City's Answer to the instant Complaint, FAA Docket No. 16-00-01. [FAA Exhibit 1, Item 6]

On April 12, 2000, the City filed a Rebuttal to Mr. Ashton's Reply to the instant Complaint, FAA Docket No. 16-00-01. [FAA Exhibit 1, Item 7]

On October 16, 2000, the FAA issued the Director's Determination, Docket #16-00-01, finding that the Concord Regional Airport was not in violation of its grant assurances and dismissing Mr. Ashton's Complaint. It stated:

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[4] In the instant complaint (FAA Docket No. 16-00-01), Mr. Ashton re-argued that: (i) the City's verbal directives to, among other things, "not enter any area not required for his aviation activity" were unjustly discriminatory, did not apply to all users, and were not necessary for safety and efficiency and were confusing in nature; (ii) the Sponsor is under the misconception that it has an unfettered right to deny access to individuals, to make and enforce unwritten rules to restrict access and to allegedly arbitrarily deny access to the public; and (iii) his entry into Hangars-In-Common to speak with pilots, mechanics and other members of the public in those hangars, or to take a photograph was an aeronautical use of the airport and not unlawful. These issues were adjudicated in the prior administrative proceeding (FAA Docket No. 16- 99-09) -- Final Agency Decision, p. 25 - 32, issued July 3, 2000; [FAA Exhibit 1, Item 9] and Director's Determination, "Analysis" section, p.25 -32; issued January 28, 2000 [FAA Exhibit 1, Item 8].

> The FAA Office of Airport Safety and Standards finds and concludes as follows:
> (1) The Respondent, by terminating the Complainant's Aircraft Storage Permit for use of public T-hangar facilities at the Concord Regional Airport, is not in violation of 49 U.S.C. 47107(a)(1) and FAA grant assurance #22 regarding reasonable access to a public use airport without unjust discrimination.
> (2) The FAA does not have the jurisdiction to decide the Complainant's alleged violations of the Fourteenth Amendment of the United States Constitution. [FAA Exhibit 1, Item 12, page 17]

On November 3, 2000, the Complainant filed an Appeal of the DD, Docket # 16-00-01. [FAA Exhibit 1, Item 13]

On November 3, 2000, the Complainant also filed a Motion for Judicial Notice [FAA Exhibit 1, Item 14] and a Notice of Change of Address Notice [FAA Exhibit I, Item 15].

On November 27, 2000, the City of Concord filed its Reply to the Complainant's Appeal. [FAA Exhibit 1, Item 16]

Factual Background

This section describes the facts relevant to the instant complaint (Docket No. 16-00-01) after review of the information presented in the record.

On July 7, 1998, the Complainant signed an Aircraft Storage Permit[5] for the Concord Regional Airport. This Permit contained a provision (Para. 10) that allowed the City or the Permittee to cancel the lease for any reason with ten (10) days written notice and states, "violations of any conditions hereof by Permittee ... shall constitute cause of cancellation." It also contained a provision (Para 4A.) that stated, "permittee shall abide by the Airport rules of the City of Concord Aviation Department..." In addition, the Permit states that the Permittee shall have 10 days from receipt of a notice of termination of the Permit within which to file an appeal to the Aviation Director. [FAA Exhibit 1, Item 3, exhibit Q]

In a letter dated December 21, 1999, the City terminated the Complainant's Permit to the T-hangar at the Concord Regional Airport, effective December 31, 1999. This letter also provided for an appeal of the termination within 10 days as stated in the Permit. [FAA Exhibit 1, Item 3, exhibit G]

In its Answer, the City stated that the reason for the termination is that the Complainant, under the guise of collecting information concerning the Airport, photographed, bothered and harassed other tenants at the Airport beginning on or about January 1, 1999. [FAA Exhibit 1, Item 5, page 1] Additionally, the City contends that the Complainant used the Airport for non-aeronautical purposes and entered areas of the Airport that he knew he was not entitled to enter. [FAA Exhibit 1, Item 5, page 3, para. 17]

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5 While Mr. Ashton indicates that he signed an Aircraft Storage Permit, the City, in its Answer and Rebuttal, refers to the Aircraft Storage Permit as a lease. In this Final Agency Decision, we use the terms "permit" and "lease" interchangeably. Both terms refer to the "Aircraft Storage Permit" signed by Mr. Ashton on July 7, 1998. [FAA Exhibit I, Item 3, Exhibit Q]

According to the City, "...on numerous occasions ... employees at CRA, as well as officers with the Concord Police Department, limited Mr. Ashton's access at the Airport to those portions of the restricted area at CRA necessary for Complainants' use and enjoyment of his aircraft due to his bothering and harassing other tenants." On September 20, 1999, after being notified by Airport authorities that he was in an area of the airport where he had no business, after the Concord Police were called and asked him to leave the area, and after he refused to leave, Mr. Ashton was cited for trespassing by the Concord Police Department. [FAA Exhibit 1, Item 5, page 3, para. 19]

Mr. Ashton admits that the City terminated his Permit to the T-hangar on December 21, 1999. The notice of termination informed the Complainant of his appeal rights. The Complainant also admits that he sometimes entered the airfield solely for the purpose of observing airfield activities of others and talking with these tenants, and that he "photographed tenants without their permission and that the process was unpleasant and bothersome for all parties involved." However, Mr. Ashton contends that "So long as the Complainant, or any member of the general public, is able to move about the airfield safely...he must be allowed to proceed." [FAA Exhibit 1, Item 3, pgs 2-4]

Subsequent to his arrest, Mr. Ashton was convicted of trespassing by the Cabarrus County District Court.[6][FAA Exhibit 1, Item 3, page 2; FAA Exhibit 1, Item 5, page 4]

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6 The Complainant provides evidence of this conviction having been subsequently dismissed. [FAA Exhibit 1, Item 14] The Respondent concurs with this evidence, stating, ". . . the

On December 28, 1999, the Complainant wrote to Gordon Belo, City Attorney, and requested additional information on the conduct of the hearing as identified in the December 21st notice of termination of his Permit. Mr. Ashton proposed that an FAA official from the FAA's Southern Region Airports Division be designated as a hearing officer. [FAA Exhibit 1, Item 3, exhibit H]

On December 29, 1999, James Greene, Jr., Assistant City Manager for Operations, responded to the letter the Complainant wrote to Gordon Belo and stated that "The Concord Regional Airport will not agree to utilize a representative of the FAA as the hearing officer on your appeal...I have also received a copy of your December 25th letter to Mr. Hiatt purportedly seeking a "mediation" of your eviction pursuant to FAA regulations in lieu of a hearing. Those regulations have no bearing on the current matter. The hearing will proceed." This letter also changed the date of the hearing for the Complainant's convenience to January 5, 2000. [FAA Exhibit 1, Item 3, exhibit K]

On December 30, 1999, the Complainant wrote again to James Green and noted five specific objections with regard to the hearing concerning his eviction. [FAA Exhibit 1, Item 3, exhibit I] The Complainant also noted that he believed that the City was not proceeding according to the published Concord

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trespass charge was dismissed on August 30, 2000, while the earlier conviction in District Court was being appealed to Superior Court [of Cabarrus County]." [FAA Exhibit I, Item 16] The "Dismissal Notice of Reinstatement" Form cites the reason for dismissal as "Other: Problem being handled civilly. Future problems will be handled criminally." [FAA Exhibit 1, Item 14, exhibit B]

Regional Airport Operations Code regarding arbitration.

On January 10, 2000, G. Tim Lowder sent a letter to the Complainant regarding the City's determination on the Appeal Hearing for Aircraft Storage Permit Termination. This letter established that a hearing was conducted with Mr. Ashton present concerning the notice of termination of Mr. Ashton's Permit, and that the hearing officer upheld the termination. However, Mr. Lowder noted that the Complainant would continue to have the right to use portions of the Airport for the general aviation public. [FAA Exhibit 1, Item 3, exhibit L]

On January 18, 2000, the Complainant filed a Complaint and Motion for Temporary Restraining Order in the state court (General Court of Justice) to stay the hangar eviction. In his request for the Order, Mr. Ashton alleged that (a) the Airport hearing was not conducted in accordance with the Concord Regional Airport Operations Code, Section V. (b) that the City is a party in opposition to the Complainant in a [Part 16] proceeding, (c) that the hearing officer is an employee of the City and not a neutral third-party, (d) the hearing was an ad hoc proceeding with the City refusing to specify any rules of procedure, rules of evidence, nor did the City notify Complainant of any grounds for eviction or evidence supporting eviction, (e) Complainant nominated an official of the FAA to be a neutral hearing officer, but was refused by the City. [FAA Exhibit 1, Item 5, exhibit 9]

On January 19, 2000, John Crosby, Aviation Director, sent a letter to the Complainant stating that because he had failed to remove his property from the T-hangar, the hangar had been secured with a padlock to secure the property and to exercise the City's

right to take possession of the hangar. [FAA Exhibit 1, Item 3, exhibit N]

Also on January 19, 2000, the Complainant sent a letter to W. Brian Hiatt, City Manager, stating that "As you are aware, I believe the City's eviction of me and the aircraft owned by my wife and I from your public airport as well as your interpretation of the law governing access to the public airfield are violations of various N.C. statutes. Accordingly, I decline to vacate the public hangar as you requested." [FAA Exhibit 1, Item 3, exhibit 0]

On February 29, 2000, the Honorable Richard D. Boner, Superior Court Judge, denied Mr. Ashton's Motion for a Temporary Restraining Order for failure to state a claim. [FAA Exhibit 1, Item 5, exhibit 11]

APPLICABLE LAW AND POLICY

The Federal Aviation Act of 1958, as amended (FAAct), 49 U.S.C. § 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. The Federal role in developing civil aviation has been augmented by various legislative actions that authorize programs for providing funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions.

The planning and development of Concord Regional Airport has been financed, in part, with funds

provided by the FAA under the Airport Improvement Program, authorized by the Airport and Airway Improvement Act of 1982, (AAIA), 49 U.S.C. § 47101 *et seq.* This program provides financial assistance to an airport sponsor for airport development in exchange for binding commitments designed to assure that the public interest will be served. These commitments are set forth in the sponsor's applications for Federal assistance and in the grant agreement as sponsor assurances, *i.e.*, a list of applicable Federal laws, regulations, executive orders, statute-based assurances, and other requirements, binding the sponsor upon acceptance of the Federal assistance. Pursuant to 49 USC § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their sponsor assurances.

FAA Order 5190.6A, *Airport Compliance Requirements*, (hereinafter Order) provides policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances.

The Airport Sponsor Assurances

The AAIA, 49 USC § 47107(a), *et seq.*, sets forth assurances to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance. Section 511(b) of the AAIA, 49 U.S.C. 47107(g)(1) and (i) as amended by Pub. L. No. 103-305 (August 23, 1994) authorizes the Secretary to prescribe project sponsorship requirements to insure compliance with Section 511(a), 49 U.S.C. 47107(a)(1)(2)(3)(5)(6) as amended by Pub. L. No. 103-305 (August 23, 1994). These sponsorship requirements are included in every AIP agreement as set forth in FAA Order 5100.38A, Airport Improvement Program (AIP)

Handbook, issued October 24, 1989, Ch. 15, Sec. 1, "Sponsor Assurances and Certification." Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the Federal government.

Preserving Sponsor Rights and Powers

Assurance No. 5, "Preserving Rights and Powers", of the prescribed sponsor assurances implements the provisions of the AAIA, 49 U.S.C. 47107 *et seq.*, and requires, in relevant part, that the sponsor of a Federally obligated airport

> ... will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor. This shall be done in a manner acceptable to the Secretary.

In addition to obligating the airport sponsor to preserve its rights and powers to carry out all grant agreement requirements, this assurance also places certain obligations on the sponsor regarding land upon which Federal finds have been spent, including the operation and maintenance of airports managed by agencies other than the sponsor.

Use on Reasonable and Not Unjustly Discriminatory Terms

Assurance 22, "Economic Nondiscrimination," of the prescribed sponsor assurances implements the

provisions of 49 U.S.C. 47107(a)(1) through (6), and requires, in pertinent part, that the sponsor of a federally obligated airport:

"...will make its airport available as an airport for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport." Assurance 22(a)
"...may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport." Assurance 22(h)
"...may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." Assurance 22(i)

Subsection (h) qualifies subsection (a), and subsection (i) represents an exception to subsection (a) to permit the sponsor to exercise control of the airport sufficient to preclude unsafe and inefficient conditions, which would be detrimental to the civil aviation needs of the public.

FAA Order 5190.6A describes the responsibilities under Assurance 22 assumed by the owners of public use airports developed with Federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on reasonable terms without unjust discrimination. See Order, Sees. 4-14(a)(2) and 3-1.

The FAA considers it inappropriate to provide Federal assistance for improvements to airports

where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities. See Order, Sec. 3-8(a).

The owner of any airport developed with Federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds and classes of aeronautical activity on reasonable terms, and without unjust discrimination. See Order, Sec. 4-13(a).

The Prohibition Against the Granting of an Exclusive Right

Assurance 23, "Exclusive Rights," of the prescribed sponsor assurances requires, in pertinent part, that the sponsor of a Federally obligated airport:

> "... will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public... It further agrees that it will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities..."

Section 308(a) of the FAA Act, 49 U.S.C. § 40103(e), provides, in relevant part, that "[a] person does not have an exclusive right to use an air navigation facility on which Government money has been expended." 49 U.S.C. § 40103(e). An "air navigation facility" includes an "airport." See 49 U.S.C. §§ 40102(a)(4), (9), (28).

Section 511(a)(2) of the AAIA, 49 U.S.C. § 47107(a)(4), similarly provides, in pertinent part, that "there will be no exclusive right for the use of the airport by any

person providing, or intending to provide, aeronautical services to the public."

In the Order, the FAA discusses its exclusive rights policy and broadly identified aeronautical activities as subject to the statutory prohibition against exclusive rights.

While public use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, we have taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. However, a sponsor is under no obligation to permit aircraft owners to introduce on the airport equipment, personnel, or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities. See Order, Sec.3-9(e).

The FAA Airport Compliance Program

The FAA discharges its responsibility for ensuring that airport sponsors comply with their Federal obligations through its Airport Compliance Program. Sponsor obligations are the basis for the FAA's airport compliance effort. The airport owner accepts these obligations when receiving Federal grant funds or accepts the transfer of Federal property for airport purposes. The FAA incorporates these obligations in grant agreements and instruments of conveyance to protect the public's interest in civil aviation and to ensure compliance with Federal laws.

The FAA designed the Airport Compliance Program to ensure the availability of a national system of safe

and properly maintained public-use airports which airport sponsors operate in a manner consistent with their Federal obligations and the public's investment in civil aviation. The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of the valuable rights, which airport sponsors pledge to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that airport sponsors serve the public interest.

The Order sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather it establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments airport owners make to the United States as a condition for the grant of Federal funds or the conveyance of Federal property for airport purposes. The Order, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the application of the assurances in the operation of public-use airports and facilitates interpretation of the assurances by FAA personnel.

ANALYSIS AND DISCUSSION

Appropriately, the DD makes conclusions of fact and law regarding the Complainant's allegations. Underlying these conclusions is the basic requirement of Part 16 that the Complainant show with evidence that the sponsor is violating its commitments to the Federal government. See Part

16, Sections 16.23 and 16.29. As is discussed below, the Complainant fails to present information in his Appeal to demonstrate any error of fact, law, or omission in the DD.

Director's Findings (16-00-01)

The Director cited findings of the previous DD (16-99-09), declining to reconsider issues of Mr. Ashton's conduct of nonaeronautical activity on the Airport. The Director appropriately identified the relevant issue: whether the termination of Mr. Ashton's lease for a T-hanger was contrary to the Sponsor's Federal obligations regarding reasonable access and economic discrimination, embodied in the Sponsor's grant assurance #22.[7] [FAA Exhibit 1, Item 12, page 15]

The Director discussed the nature of Mr. Ashton's nonaeronautical behavior, including photographing, bothering and harassing other tenants at the Airport, as well as entering various leaseholds, and the City's statement that it was this behavior that led to Mr. Ashton's eviction. [FAA Exhibit 1, Item 12, page 8] The Director notes Mr. Ashton's own admissions that he conducted nonaeronautical activities and photographed tenants without permission and that the behavior was "... unpleasant and bothersome..." [FAA Exhibit 1, Item 12, page 9] See also Complaint, FAA Exhibit 1, Item 3, pages 3,4 and 6. These issues were also addressed in Mr. Ashton's prior Complaint (Docket #16-99-09). The Director acknowledged that the Sponsor enacted a verbal rule, in response to Mr. Ashton's admitted bothersome nonaeronautical behavior, that

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[7] The issue of the granting of an exclusive right, raised in the Appeal but not in Complainant's pleadings, will be discussed below.

restricted Mr. Ashton to those areas required for aeronautical activity. [FAA Exhibit 1, Item 12, page 16] The Director had previously found that these restrictions were not shown to be unreasonable or unjustly discriminatory.[8]

The Director found that Mr. Ashton's eviction from his hanger has not had the effect of denying him access to the public airfield [FAA Exhibit 1, Item 12, page 11] and that the City's "non-voluntary lease termination provision, by itself does not establish a violation of Assurance 22." [FAA Exhibit 1, Item 12, page 15] Concerning the possibility that the Sponsor did have sufficient cause to evict Mr. Ashton, the Director noted:

> ...we are persuaded that the City may have had sufficient cause to exercise the lease termination provision at issue. Specifically, the record reflects that Mr. Ashton was arrested and convicted for criminal trespass at the Airport. Mr. Ashton's conviction,

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[8] In the Director's Determination in Docket #16-99-09, the Director stated, "The Complainant states that other users of the Airport were not subject to the increased scrutiny of their nonaeronautical activities, as was the Complainant, suggesting that this amounted to unjust discrimination under grant assurance 22. As stated above, the nonaeronautical activities described above are beyond the jurisdiction of the FAA grant assurances. Furthermore, a Sponsor may be acting within the letter and spirit of the grant assurances by restricting the nonaeronautical activity of an individual, if that activity has the effect of interfering with the safe and efficient enjoyment of the conduct of aeronautical activities by users of the Airport. Even if the Complainant were to be exonerated of any alleged violation of state or local law, he would still have to show that his use of the Airport as an Airport was subject to unreasonable terms or restrictions, or that another similar aeronautical user was provided with a preference amounting to unjust economic discrimination." [FAA Exhibit I, Item 8, page 32]

> while not an issue within the jurisdiction under 14 CFR Part 16, supports the City's argument that Mr. Ashton failed to abide by the terms and conditions of his Aircraft Storage Permit. Specifically, Paragraph 4-A of the Aircraft Storage Permit requires that permittees must abide by, among other things, airport rules and local ordinances [FAA Exhibit 1, Item 12, page 15]

The Director found that there was no unjust economic discrimination because Mr. Ashton had failed to show that another tenant had conducted similar nonaeronautical activities at the Airport and not had his T-hanger permit terminated.[9] [FAA Exhibit 1, Item 12, page 16]

Regarding allegations of economic discrimination, the Director found that:

> Mr. Ashton admits that he has entered the airport to observe the activity of other T-hangar tenants [FAA Exhibit 1, Item 3, p. 3] and to photograph their activities; admits that the process was unpleasant and bothersome for all parties involved [FAA Exhibit 1, Item 3, p. 6]; and admits that on several occasions the Airport authorities gave him various verbal instructions to, among other things, "not enter any area not required for his aviation activity." [FAA Exhibit 1, Item 3,p.4] ...

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[9] The FAA notes that the incidental breaking of airport rules by airport users does not constitute a Sponsor's noncompliance with Federal obligations. [See Order, Sec 5-6(a)(2)] Furthermore, in this case, the behavior in question is nonaeronautical and not subject to the Federal grant assurances.

> Mr. Ashton has provided no evidence to show that another tenant at the airport had been repeatedly warned of violations of the airport rules and regulations and did not have their T-hangar permit terminated. Accordingly, the FAA can find no unjust economic discrimination with respect to Mr. Ashton's eviction from the T-hangar he occupied. See FAA Exhibit 1, Item 12, page 16.

Finally, the Director found that "The FAA's administrative complaint process for matters pertaining to federally assisted airports is not the proper forum for review of Complainant's claims of violations of constitutional, state, or local laws." [FAA Exhibit 1, Item 12, page 14]

For these reasons, the Complaint was dismissed.

Complainant's Appeal and Acting Associate Administrator's Analysis

As quoted in the Introduction Section, above, the Complainant presents five grounds for his appeal of the DD to the Acting Associate Administrator. Generally, these grounds focus on issues of constitutional protections, burden of proof and rules of evidence regarding the Sponsor's actions, including those relevant to Mr. Ashton's prior Complaint, and the FAA's consideration of these actions. The Complainant does not present new facts, but rather questions the reasoning used and the legal basis for the Director's Determination. The Complainant does not expound on these grounds directly, listing as a separate section, "Errors in the Director's Determination" without direct reference to the five grounds.

Separate from his discussion of alleged errors, Mr. Ashton objects to the Director's conclusions regarding his current ability to use the Airport. The Complainant cites a letter from the Sponsor in his Appeal that states, "You may not access any restricted area at the airport... Any unauthorized access by you within restricted areas will be deemed a trespass and will be treated accordingly." [FAA Exhibit 1, Item 3, exhibit N] However, that sentence is immediately followed by this sentence: "As Mr. Hiatt advised you, you may utilize public areas and public facilities of the Airport available for use by the aircraft operators, as set forth in the Airport's Rules and Regulations." [FAA Exhibit 1, Item 3, exhibit N] Furthermore, the Respondent states,

> The City has repeatedly and consistently stated that Complainant has the same rights at the Airport as any other non-tenant. So long as Complainant follows the rules and regulations governing the Airport, he may take-off and land, drop-off and pick-up passengers, have his aircraft serviced, and have his aircraft re- fueled. There has been no attempt by the City to prevent Complainant from using the Airport in the same manner as any other non-tenant. [FAA Exhibit 1, Item 16, page 4]

The Director found that "Although it is apparent from the record that Mr. Ashton is no longer permitted the privilege of storing his aircraft in a City-owned T-hangar at the Airport, the FAA is not persuaded that the Respondent has denied the Complainant access to the public airfield." See FAA Exhibit 1, Item 12, page 11. Despite the Complainant's objection in the Appeal, [FAA Exhibit 1, Item 13, page 2], the Acting Associate

Administrator is persuaded that the City allows the Complainant to use the airfield.

The following is the Acting Associate Administrator's discussion of the Complainant's allegations of error in the DD.

a. The Director failed to apply mandatory presumptions that the exercise of First Amendment rights cannot be the basis for denial of use of a federally funded airport and that retaliation under color of law for exercise of Constitutional right is prima facie unlawful.

The Complainant states that he was entitled "to a determination [by the Director] of the constitutional and civil rights claims, accompanied by a presumption by the FAA that discrimination against First and Fourteenth Amendment rights of speech, petition, and due process are prima facie unlawful and therefore unjustly discriminatory." [FAA Exhibit 1, Item 13, page 6] The Complainant cites court cases and concludes that "the Agency here is required to presume that discrimination against speech because of its message is unconstitutional, and the agency is required to find the facts of the case." [FAA Exhibit 1, Item 13, page 6]

The Complainant also states that "The Agency must begin its investigation with a bedrock presumption that First Amendment activities are not actionable and exercise of First Amendment freedoms are not a basis for denial of federal benefit." [FAA Exhibit 1, Item 13, page 11]

The Acting Associate Administrator finds that the Director's declining to consider the Complainant's First Amendment issues was appropriate because (1) the FAA does not have the jurisdiction to decide

the Complainant's alleged violations of the Fourteenth Amendment of the U.S. Constitution[10]; and (2) the Complainant's admission that the conduct in question that he alleges is protected free speech was nonaeronautical behavior, and therefore outside the scope of the Sponsor's obligations to the Federal government as embodied in the grant assurances. The City stated that Mr. Ashton was evicted for this non-aeronautical behavior, described as photographing, bothering and harassing other tenants. [FAA Exhibit 1, Item 5, page 1] The Complainant has repeatedly volunteered that he conducted nonaeronautical activity on the Airport and that that activity may have been bothersome, as discussed below. [FAA Exhibit 1, Item 3, pgs 2-4] See FAA Exhibit 1, Item 12, page 9. The Director relied upon the Complainant's own description of his activities at the Airport.

Therefore the Acting Associate Administrator finds that the Director appropriately focused on the relevant grant assurances, declining to consider the allegation of a violation of Mr. Ashton's First Amendment rights as the basis for denial of use of a federally funded airport, and the allegation that retaliation under color of law for exercise of Constitutional right is prima facie unlawful.

b. The agency improperly declined to investigate the Complaint in light of the presumptions of constitutional and civil rights law and failed to find the facts.

The Complainant states in his Appeal, "The Director incorrectly states that the agency does not have jurisdiction to determine violations of constitutional

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10 Section 16.1 limits the types of issues that can be raised in a complaint.

laws (DD. P 14). This statement is overbroad. Agencies ... may determine violations of laws within their statutory authority." [FAA Exhibit 1, Item 13, page 6] He also states, "The FAA was obligated here to apply its special expertise in the area of grant agreements, Assurances, airport operations and management, airport safety and the needs of civil aviation, to find the facts relating to Ashton's claims. It did not do so." [FAA Exhibit 1, Item 13, page 7] Mr. Ashton concludes, stating, "Agency is not entitled to conclusive presumptions which entirely dispense with the need to present proof to resolve a factual dispute. ... No admissible proof of unlawful or improper activity is in the record. Therefore the agency's conclusions were not supported by evidence in the record." [FAA Exhibit 1, Item 13, page 8]

Again, the Acting Associate Administrator finds that the question of whether or not Mr. Ashton's nonaeronautical activity was constitutionally protected is not within the jurisdiction of the FAA, for the reasons cited in the DD, and above. Furthermore, the FAA does not have special expertise to resolve these issues. The FAA is unconvinced by the evidence that Ashton's admitted nonaeronautical behavior that is at issue here and that resulted in his eviction was within some constructed, broad definition of aeronautical use.

Simply put, the Complainant repeatedly described his nonaeronautical behavior (behavior that is not protected by the grant assurances) on the Airport, in the record. The City cited this behavior as the reason for the Complainant's conviction. The grant assurances do not require that a sponsor only take action if this nonaeronautical behavior is found to be unlawful. As discussed below, it would appear that the City was reasonable in taking action regarding

the Complainant's nonaeronautical behavior in order to preserve standards of conduct that are consistent with the safe and efficient operation of the Airport. As stated above, these issues are nonaeronautical and largely admitted to by the Complainant.

Therefore, the Acting Associate Administrator finds that the agency properly declined to investigate this issue.

c. The agency failed to recognize that when fundamental rights are implicated, government, i.e., the Sponsor and the FAA, incur a burden-of-proof to show that Mr. Ashton's fundamental rights were curtailed for a compelling governmental purpose.

The Complainant states that "The FAA clearly misunderstands the concept of burden-of-proof and how it can shift between parties." [FAA Exhibit 1, Item 13, page 8] He further argues:

> ...the Sponsor accused Ashton of wrongdoing and used the allegation as justification for denying use of the Airport. This allegation by the Sponsor clearly placed a burden on the sponsor to prove Ashton's wrongdoing. However, again, the evidence in the record does not prove wrongdoing.
>
> Finally, the infringement on freedom of speech alleged by the complaint sets up a strict-scrutiny test which places a burden-of-proof on the government entity to show that curtailment of speech was required by compelling government interest. [FAA Exhibit 1, Item 13, page 8]
>
> ...Ashton's evidence was incontrovertible: The Sponsor retaliated under the guise of its management powers for Ashton's exercise of

> fundamental rights and it unlawfully denied a federal benefit for an unconstitutional reason and without due process. ... Consequently, the FAA's determination was arbitrary and capricious, and made without observance of procedure required by law. [FAA Exhibit 1, Item 13, page 9]

The Acting Associate Administrator finds that the burden of proof issue is not justiciable here. Also, this burden of proof issue is irrelevant, as a matter of fact, in as much as Mr. Ashton repeatedly admits that he conducted nonaeronautical activity on the Airport and that that activity may have been bothersome [sic]. As described by the Director in the DD:

> The Complainant also admits that he sometimes entered the airfield solely for the purpose of observing airfield activities and talking with other tenants and that he "photographed tenants without their permission and that the process was unpleasant and bothersome for all parties involved." [FAA Exhibit 1, Item 3, pgs 2-4] See FAA Exhibit 1, Item 12, page 9.

> The City stated that the reason for the termination is that the Complainant, under the guise of collecting information concerning the Airport, photographed, bothered and harassed other tenants at the Airport beginning on or about January 1, 1999. [FAA Exhibit 1, Item 5, page 1] See FAA Exhibit 1, Item 12, page 8.

As stated by the Respondent, and confirmed by the Director and the Acting Associate Administrator:

> In a letter from Complainant to the Airport Manager dated April 8, 1999, Complainant admits that "I concede that I have, on two occasions, entered Hangers A and B to speak with pilots and mechanics and photograph aircraft, henceforth, I will not enter any leased area without an invitation from the lessee or his representative." In Complainant's Motion for Cease and Desist filed in his first FAA action, Complainant stated, "Complainant admits that he may have 'bothered' a few tenants." In a letter to the City Manager dated June 1, 1999, Complainant stated that, "I believe I surprised this woman by taking a picture of her activity without first warning her..." An affidavit attached to Complainant's Reply in support of his Complaint in this case describes a scene in which Complainant approached another tenant of the Airport to take pictures without permission and the tenant "became angry and tried to block Ashton's photography. [The tenant] approached Ashton in a threatening manner and appeared ready to take Ashton's camera. Ashton warned [the tenant] that if [the tenant] touched him or his camera, Ashton would charge [the tenant] with assault." [FAA Exhibit 1. Item 16, page 3]

Once again, the Complainant states that the Director had to prove unlawful or improper nonaeronautical activity in order to find the facts to dismiss the case. This is incorrect. The circumstances that the Complainant alleges require additional proof are not related to Mr. Ashton's use of the airport as an airport and therefore are not relevant to the Sponsor's obligations to the Federal government that are embodied in its grant assurances and cognizable under Part 16.

It is the Complainant's responsibility to substantiate that the City has, in fact, unreasonably denied access, unjustly discriminated against him or her or granted an exclusive right. Title 14 of the Code of Federal Regulations, Section 16.23, provides, in relevant part, that complaints filed under this subpart shall "Provide a concise but complete statement of the facts relied upon to substantiate each allegation." Additionally. Section 16.29 provides that "In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided under this subpart. Each party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance." Specifically, a claim of unjust discrimination must include a showing that similarly situated users have been treated dissimilarly without adequate justification. In this case, Mr. Ashton does not provide evidence of others conducting bothersome, nonaeronautical activities at the Airport, much less show evidence that another Airport user confronted aeronautical users and took uninvited pictures, as admitted to by Mr. Ashton. [FAA Exhibit 1, Item 16, page 3] Discussion of these circumstances should not be construed as the Acting Associate Administrator's acceptance of the premise that Mr. Ashton's behavior was aeronautical in nature or protected by the grant assurances.

Therefore, the Acting Associate Administrator finds the Director ruled properly under Part 16 that the Complainant has the burden of proof.

d. The Director admitted and relied upon inadmissible evidence: The agency admitted evidence of a criminal action under appeal, and relied upon it improperly to show the truth of

allegations in this civil action. It also admitted and relied on inadmissible hearsay.

The ultimate issue raised in the Appeal is whether the Sponsor exercised the lease termination provision in an unjustly discriminatory manner in violation of the grant assurances and related statutory provisions. In the DD, the Director found that (1) the mere existence of the non-voluntary lease termination provision was not inconsistent with grant assurance #22, and (2) the City did not exercise the non-voluntary lease termination provision in a manner that was inconsistent with grant assurance #22. [FAA Exhibit 1, Item 12, page 15]

The Complainant states, "The FAA admitted and relied upon Ashton's criminal trespass conviction under appeal as evidence of wrongdoing and nonaeronautical activity which warranted restrictions on his airport use.... Admission of this evidence was clearly improper." [FAA Exhibit 1, Item 13, page 9] Specifically, throughout his Appeal, the Complainant cites that this reliance was improper because:

* the conviction was not a final judgment in criminal action;
* the Federal Rules of Evidence prohibited such reliance by the FAA;
* the conviction is not relevant to any FAA determination;
* there were no grounds for the arrest or charges;
* the arrest represented malicious prosecution by the City;
* the charge the Complainant was dismissed [sic], the Director may not rely upon it;
* the elements of trespass were never met
* Complainant followed established laws and airport rules.

In finding that the City's termination of Complainant's lease was reasonable and not unjustly discriminatory, the Director relied upon Complainant's pattern of conduct from the record. In his discussion of economic discrimination specifically, the Director noted that Complainant has admitted that (1) he entered the airport to observe the activity of other T-hangar tenants and to photograph their activities; (2) these activities were unpleasant and bothersome for all parties involved, including other tenants;[11] (3) on several occasions, based upon the various non-aeronautical activities (photography, harassment of other airport users, and the like), the Airport management and local police warned him not to enter areas of the airport not required for his aviation activities.[12] [FAA Exhibit 1, Item 12, page 16]. The

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11 According to the airport manager's affidavit: "During 1999, Mr. Ashton began to drive and walk in areas of the Airport that were unnecessary for his use and enjoyment of the Airport. In particular, Ashton began to enter hangars and areas leased by other tenants. Ashton began to disturb these tenants and, on some occasions, took pictures of tenants without their permission. I received complaints from several tenants concerning Ashton's activities. The rules and regulations of the Airport prohibit conduct that constitutes a nuisance. Because of Ashton's activities, he was notified by me that he was to confine his activities on the Airport to those restricted areas necessary for the use and enjoyment of his aircraft ... Subsequent to my notification to Ashton that he not enter restricted areas unnecessary to the use and enjoyment of his aircraft, I personally observed Ashton in such areas. On these occasions, I requested that Ashton leave the restricted area and confine his activities to those areas required for the use of his aircraft." [FAA Exhibit 1, Item 3, exhibit R

12 As reflected in this record by the Respondent's submission of the DD in docket # 16-99-09, on at least two occasions prior to the September 20 incident, officers of the Concord Police Department were present at the airport and advised Mr. Ashton that he was not to go anywhere in the restricted areas of the airport that were not necessary for the use of his

Director also noted that the record indicated that despite the verbal admonishments and other notifications of repeated violations received by Mr. Ashton, Complainant chose to continue his pattern of behavior until he was eventually arrested on September 20, 1999, and subsequently charged with criminal trespass. [FAA Exhibit 1, Item 12, page 16] In his analysis, the Director did not rely exclusively upon the fact that Mr. Ashton was arrested and convicted. In fact, the Director describes a pattern of conduct by Complainant occurring prior to the September 20 incident that was inconsistent with the airport's rules and regulations.[18]

This pattern of behavior is further described in this record and in the record of the prior Complaint (Docket No. 16-99-09) that had previously examined and dismissed these allegations made by the Complainant in regard to the Sponsor's limiting Mr. Ashton's behavior at the Airport. The record discloses these other incidents, in addition to the September 20 incident, which support the City's termination of the lease. [See, FAA Exhibit 1, Item 16, page 3.] As discussed sub-section "c" above, the Complainant characterizes this behavior in his Appeal: "Ashton's speech may indeed have been bothersome..." [FAA Exhibit 1, Item 13, page 3] He admitted, in his Complaint, that he "entered the airfield solely for the purpose of observing airfield activities and talking with other tenants." [FAA

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aircraft. [FAA Exhibit I, ItemS, exhibit 3, item 10, exhibit H] (Affidavit of Concord City Police Chiefl.

[18] As reflected in this record by the Respondent's submission of the DD in docket # 16-99-09, the Concord Airport's Code, under "Disorderly Conduct," prohibits commission of "...any act of nuisance..." and under "Restricted Areas," prohibits any person from entering any restricted areas. [FAA Exhibit 1, Item 5, exhibit 3, item 17]

Exhibit 1, Item 3, page 3] Again, the Complainant describes his behavior:

> On two or more occasions, the Complainant observed other T-hangar tenants performing maintenance on their aircraft.... Since such actions are not permitted by the Sponsor..., the Complainant politely stated to these tenants to these tenants [sic] that these maintenance activities appeared to violate the storage permit.... The Complainant photographed these activities and reported them to the Airport authorities, who subsequently directed the tenants to stop what they were doing and admitted that these tenants had violated airport rules.[14] Complainant admits that the process was unpleasant and bothersome for all parties involved. [FAA Exhibit 1, Item 3, page 6]

Again, as stated by Mr. Ashton, in a letter to Airport management, dated April 8, 1999:

> When I visited your office on 7 April 1999 at 10:40 AM, you directed me to stop taking pictures at the airport, stop walking around with my "clipboard" and you stated that I was harassing other persons on the airport....
>
> I concede that I have, on two occasions, entered Hangars A and B to speak with pilots and mechanics and photograph aircraft, henceforth, I will not enter any leased area without an invitation from the leasee or his representative....

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[14] The record supports that the Sponsor did follow-up on Mr. Ashton's reports of other tenant's violation of Airport rules. See Item 7, page 10 to the Director's Determination (16-99-09). [FAA Exhibit 1, Item 5, exhibit 3, page 30]

> I reserve the right to photograph any activity on the airfield....
>
> I reserve the right to photograph, approach and talk to any persons in the public areas of the airport. [FAA Exhibit 1, Item 3, exhibit C]

It appears that Complainant takes issue with the Director's discussion of the reasonableness issue (FAA Exhibit 1, Item 12, page 15), in which the Director limits his reference to the record (by citing only Mr. Ashton's arrest and conviction[15]) in discussing the support found in the record for the City's termination of Complainant's lease. Clearly, the Director could have cited other evidence, such as that discussed above, in addition to the September 20 incident (when Mr. Ashton disobeyed airport management and police requests to leave a restricted area of the airport) and should have done so to support more fully his reasonableness finding.[16] I find that the record adequately supports the Director's finding of reasonableness, even if the September 20 incident had not been cited or relied upon by the Director.

I further find that it was appropriate for the Director to have relied upon the September 20 incident for these reasons. First, what the Director actually relied upon was Mr. Ashton's noncompliance with airport rules and regulations, for which he may or may not have been subject to

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15 Mr. Ashton expressly acknowledged his arrest and conviction for criminal trespass in his Complaint. [Exhibit 1, Item 3, page 2]

16 At the time the Director made his findings, the criminal charges against Mr. Ashton had not yet been dismissed. However, as will be discussed, the fact that Mr. Ashton's charges were eventually dismissed is not relevant to the Director's findings, nor mine.

arrest. The Director stated on page 15 of the DD, "Mr. Ashton's conviction, while not an issue within the jurisdiction under 14 C.F.R. Part 16, supports the City's argument that Mr. Ashton failed to abide by the terms and conditions of his Aircraft Storage Permit." [FAA Exhibit 1, Item 12, page 15] The September 20 incident does just that - it supports the City's argument that Mr. Ashton did not comply with the airport's rules and regulations and supports the FAA's finding as well - that the City did not violate the reasonableness and unjust discrimination provisions of 49 U.S.C. 47107(a)(l) and FAA grant assurance no. 22. The fact that Mr. Ashton was actually arrested and cited for criminal trespass is not material to the Director's findings, nor mine. If Mr. Ashton had not been arrested on September 20, his actions on that day would still appear to have been in violation of the airport's rules and regulations.[17] Second, because it is not material to any FAA finding that Mr. Ashton was subject to arrest, it is not relevant that his charges were

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[17] The Concord Regional Airports [sic] Operations Code states at section 01.02(C) 1, "Disorderly Conduct: No person shall be or become intoxicated or drunk, commit any disorderly, obscene or indecent act, or commit any act of nuisance..." At section 0l.02(C)6, the Code states, "Restricted Areas: No person shall enter upon the field area, utilities and service rooms or areas, or other areas as may be designated RESTRICTED..." [Item 17 to FAA Exhibit 1, ItemS, Exhibit 3] Mr. Ashton's lease contained a provision (Para. 10) that allowed the City or the Permittee to cancel the lease for any reason with ten (10) days written notice and states, "violations of any conditions hereof by Permittee . . . shall constitute cause of cancellation." It also contained a provision (Para 4A.) that stated, "permittee shall abide by the Airport rules of the City of Concord Aviation Department. . ." In addition, the Permit stated that the Permittee shall have 10 days from receipt of a notice of termination of the Permit within which to file an appeal to the Aviation Director. [FAA Exhibit 1, Item 8, exhibit Q]

eventually dismissed.[18] Again, from the point of view of the FAA's grant enforcement responsibilities, the September 20 incident is only relevant in that his conduct leading up to the arrest provides yet another example of Complainant's violation of the airport's rules and regulations.

As we have said in the DD and in pleadings related to Mr. Ashton's prior complaint, it is prudent for the City to condition tenant access to hangar facilities on compliance with local laws, which would include airport laws, minimum standards, and lease terms. I also affirm prior FAA statements to the effect that tenant violations of state or local laws (including airport laws, minimum standards, and lease provisions) could reasonably serve as a legitimate basis for the airport management to restrict that tenant's ability to conduct aeronautical activities on the airport.[19]

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[18] However, we note, as does the City in its Reply to the Appeal, that the dismissal notice provided to us by Mr. Ashton indicates that his charges were not dismissed because there was "insufficient evidence to warrant prosecution" but because the "problem [was] being handled civilly." The notice also admonishes Mr. Ashton that "future problems will be handled criminally." [FAA Exhibit 1, Item 14]

[19] Perhaps it should be reemphasized that the grant assurance requirements enforced by the FAA concerning reasonableness, reasonable access, and unjust discrimination relate only to the aeronautical portions of the airport. The Part 16 preamble states, "... Most of an airport operator's obligations are intended for the benefit of aeronautical users. A complaint alleging that an airport operator's treatment of a nonaeronautical user violates such obligation would be dismissed even though the nonaeronautical user was directly and substantially affected by the alleged practice. For example, the assurance against unjust discrimination by an airport operator only applies to aeronautical users, so a complaint by a nonaeronautical user alleging unjust discrimination by an airport operator would be dismissed." 61 Fed. Reg. 53999 (Oct. 16, 1996). Although Mr. Ashton was an aeronautical user of the airport, his

Mr. Ashton also argues that because his conviction was not yet a final judgment at the time the Director issued his decision, the Director should not have considered it. However, as stated above, the fact that Mr. Ashton was arrested and convicted is not relevant to the FAA's findings.

Complainant next argues that the Federal Rules of Evidence prohibit reliance by the FAA on his criminal conviction. However, as stated above, the fact that Mr. Ashton was arrested and cited for criminal trespass is not relevant to the FAA's findings.

Concerning relevancy, the September 20 incident is relevant to the extent that it indicates an example in the record of Complainant's violation of airport rules and regulations. The record indicates that after having been warned by airport management that he was in a restricted area without permission, and by the police of his impending arrest for trespass (and given a chance to leave the area), Mr. Ashton refused to comply. Mr. Ashton's actions here are relevant. Again, Mr. Ashton's subsequent arrest is not relevant to the FAA's findings.

Whether lawful grounds existed for Mr. Ashton's arrest and whether the arrest represented malicious prosecution is not for the FAA to decide. As stated earlier, the FAA has no jurisdiction over local civil or criminal law or related prosecutions. Mr. Ashton's allegations concerning being singled out by the airport management and treated differently have already been addressed in FAA Docket No. 16-99-09.

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noncompliance with the airport's rules and regulations was non-aeronautical in nature (trespass, nuisance, photography in restricted areas, etc.).

As stated above, the fact that the charges against Mr. Ashton were dismissed has no bearing on whether the FAA may rely upon the fact that Complainant acted contrary to the City's airport rules and regulations. Even if this incident had never occurred, there are other examples in the record, as noted, that support the City's action.

The fact that Mr. Ashton believes that the legal elements of trespass law were not met in his case is not relevant to this FAA action. What is relevant is whether the City had a reasonable and not unjustly discriminatory basis to terminate Mr. Ashton's lease as an airport tenant. Complainant's conduct need not meet the common law definition of "trespass" to serve as one of the bases for the termination of his lease. The FAA need not prove any common law elements of trespass.

Although Mr. Ashton states that he followed established laws and airport rules, the record, as noted, indicates otherwise. [See FAA Exhibit 1, Item 3, page 3; FAA Exhibit 1, Item 3, page 6; FAA Exhibit 1, Item 3, exhibit C; FAA Exhibit 1, Item 16, page 3]

Therefore, the Acting Associate Administrator finds that Mr. Ashton's pattern of behavior, including the conduct that led to his arrest, supports the City's termination of Mr. Ashton's lease as being reasonable and not unjustly discriminatory. The Director's actual reference to evidence of criminal action under appeal was not inappropriate. The Director did not rely on inadmissible evidence.

e. Many of the Agency's sub-findings, by way of which it reached the overall conclusion, were made arbitrarily and capriciously, or were

> contrary to law, made without observance of procedure required by law or harmfully prejudicial to Complainant's case. [FAA Exhibit 1, Item 13, page 1]

The Complainant does not directly describe the sub-findings that he objects to in this category. However, the investigator's review of the Appeal reveals several objections presented by the Complainant throughout the Appeal. Many of the Complainant's objections surround the FAA's alleged misinterpretation or inadequate reasoning regarding the Sponsor's alleged actions against the Complainant.

The Complainant states that "the Sponsor committed malicious prosecution and abuse of process." [FAA Exhibit 1, Item 13, page 10] The Complainant states that "the Sponsor used its management powers for punishment, when it should have sought the legal recourse available to it in the courts." [FAA Exhibit 1, Item 13, page 11]

The Acting Associate Administrator again finds again that the question of malicious prosecution by the City of Concord is clearly outside the jurisdiction of the FAA. Furthermore, the Acting Associate Administrator notes that the Complainant admitted to bothersome, nonaeronautical behavior. The Sponsor admitted to evicting the Complainant because of the nature of this bothersome, nonaeronautical behavior. Whether this nonaeronautical behavior was protected free speech is not within the jurisdiction or the expertise of the FAA. The Sponsor did not limit the Complainant's ability to use the Airport as an airport.

Other Complainant's objections surround the DD's

alleged omission of issues that should have been addressed in this case.

The Complainant states that the "Agency ignored the issue of Ashton's wife. The Sponsor denied to Ashton's wife, a right to base her aircraft at the federally funded facility... If the Agency declines to rule, Mrs. Ashton likely will file her own complaint." [FAA Exhibit 1, Item 13, page 11] However, the Acting Associate Administrator notes that the Complainant's spouse is not a party to this Complaint, nor has the Complainant presented any evidence of this person's ability to or interest in using the Airport as an airport. The fact that the Complainant's spouse may be a half-owner of certain equipment is not relevant because only the Complainant is a party to the lease (in addition to the City). The fact that Complainant's spouse may be a part owner of Complainant's aircraft is not relevant.

The Complainant cites the Director for not analyzing the Complainant's allegations concerning an exclusive right violation, 49 U.S.C. 40103(e). As noted, the Complainant failed to allege such a violation in his Complaint, raising it for the first time on appeal. [FAA Exhibit 1, Item 13, page 10]. However, as discussed above, we will address it here. As stated in the Applicable Law and Policy Section, the prohibition against the granting of an exclusive right only applies to aeronautical activity. It does not protect a user's ability to conduct nonaeronautical activity. Moreover, the Acting Associate Administrator upholds the Director's conclusion that the Sponsor had not unreasonably denied access or unjustly discriminated. The Acting Associate Administrator has not found that the Complainant has shown that others were afforded greater rights to use the Airport as an airport, in the sense that another user was allowed to conduct

admittedly bothersome, nonaeronautical activity without restriction. Nor has the Acting Associate Administrator found that the restrictions placed on Mr. Ashton unreasonably denied him the use of the Airport as an airport. Because the Complainant failed to raise the exclusive rights issue in his Complaint, the Director appropriately declined to discuss this issue. However, as discussed, the prohibition on exclusive rights does not apply to non-aeronautical conduct.

Therefore, the Acting Associate Administrator finds that the Director did not conclusively rely upon any findings or sub-findings that were made arbitrarily and capriciously, were contrary to law, were made without observance of procedure required by law or were harmfully prejudicial to Complainant's case. [FAA Exhibit 1, Item 13, page 1]

Findings and Conclusion

As stated in the Applicable Law and Policy section above, the grant assurances are binding commitments to the Federal government designed to assure that the public interest will be served, in exchange for financial assistance to an airport sponsor for airport development. They do not preempt local rules or laws governing nonaeronautical behavior, nor do they prevent the airport from exercising proprietary powers, such as determining how to structure the leasing of property on the airport. They require, among other things, that the Sponsor structure such powers, as expressed in reasonable rules, standards, terms and conditions, so as not to degrade the value of the Federal taxpayers' investment in the Airport.

Toward that end, it was reasonable for the Sponsor to enact rules, regulations and local laws to promote

safety and efficiency and to serve the aeronautical interests of the public. It is also reasonable for the Sponsor to enforce these rules upon its tenants, including Mr. Ashton, and to subsequently limit his access to restricted areas of the Airport. The relevant Federal obligations here address a person's use of the airport as an airport- in other words- aeronautical activity. Mr. Ashton has not been prevented, and is not currently being prevented, from using the public areas of the airport for aeronautical purposes.

Finally, the FAA would expect a sponsor to protect its tenants from nonaeronautical behavior that might have the effect of diminishing safety or reducing the efficient use of aeronautical facilities, impede the interests of the public in civil aviation or constitute a nuisance, through rules of conduct and reasonable terms in a lease. The Sponsor's response to Mr. Ashton's admitted nonaeronautical behavior is reasonable. The Director had previously determined in Mr. Ashton's prior Complaint (Docket #16-99-09) that the:

> Sponsor may be acting within the letter and spirit of the grant assurances by restricting the nonaeronautical activity of an individual, if that activity has the effect of interfering with the safe and efficient enjoyment of the conduct of aeronautical activities by users of the Airport. Even if the Complainant were to be exonerated of any alleged violation of state or local law, he would still have to show that his use of the Airport as an airport was subject to unreasonable terms or restrictions, or that another similar aeronautical user was provided with a preference amounting to unjust economic discrimination. [FAA Exhibit 1, Item 8, page 32]

Based on the foregoing discussion and analysis, the Acting Associate Administrator concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent and FAA policy as described above. The Appeal does not provide a sufficient basis, in fact or in law, for reversing the Director's Determination with regard to the City of Concord's obligations under 49 USC §40103(e), §47107(a) or its grant assurances. Furthermore, the FAA does not have jurisdiction to determine the Complainant's claims to constitutional protections of his rights relating to nonaeronautical behavior at the Airport. Furthermore, the Acting Associate Administrator finds that the Director did not err by not discussing the issue of exclusive rights; nor did he err by not considering the Complainant's spouse as a party to the Complaint.

ORDER

The FAA dismisses this Appeal and affirms the Director's Determination pursuant to 14 CFR Part 16.33. This Decision constitutes the final decision of the Acting Associate Administrator for Airports, pursuant to 14 CFR 16.33(a), under the authority of 49 U.S.C. Section 47122.

APPEAL RIGHTS

A person disclosing a substantial interest in this final decision and order of the Federal Aviation Administration may file a petition for review pursuant to 49 U.S.C. Section 46110, in the United States Court of Appeals for the District of Columbia Circuit or in the court of Appeals of the United States for the Circuit in which the person resides or

has its principal place of business. The petition must be filed not later than 60 days after the order is issued.

s/Woodie Woodward
Woodie Woodward
Acting Associate Administrator for Airports

4/17/01
Date

APPENDIX C

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Kent J. Ashton (COMPLAINANT)	)	
	)	
v.	)	FAA Docket No. 16-00-01
	)	
City of Concord, NC (RESPONDENT)	)	

DIRECTOR'S DETERMINATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on a formal complaint filed in accordance with our Rules of Practice for Federally-Assisted Airport Proceedings (FAA Rules of Practice), 14 CFR Part 16.

Kent J. Ashton (Complainant/Ashton) filed a complaint against the City of Concord, North Carolina (Respondent/City), sponsor of the Concord Regional Airport (Airport), alleging that the City, in operating the Airport, has engaged in activity contrary to its Federal obligations.

Specifically, Mr. Ashton asserts that the City required him to sign an Aircraft Storage Permit as a prerequisite to taking constructive possession of a T-hangar[1] and he would not have been permitted to

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[1] A T-Hangar is a structure typically used for the storage of privately-owned aircraft on an airport.

store an aircraft unless he agreed to the conditions in the Permit. Mr. Ashton contends that the Permit contains a "non-voluntary lease tennination provision" that "works to deny public access to the Airport facilities" and is exercisable at the "whim" of the City.

According to Mr. Ashton, the "cause" the Sponsor will cite for "evicting"[2] him will include (1) entering the airfield for non-aeronautical purposes, (2) entering areas he knew, or should have known, were unauthorized, and (3) harassing and bothering other tenants. However, Mr. Ashton argues that the City's restrictions are unreasonable because they are not necessary for the safe and efficient operation of the airport, confusing, ambiguous, open to interpretation, and contradictory in nature. Additionally, Mr. Ashton contends that his observations and speech were lawful and consistent with the fight of the general public to observe the operation of a public enterprise and such activities by the Complainant fall under the umbrella of fair and reasonable use, whether or not such use is aeronautical.

Finally, Mr. Ashton alleges that his right to use a Federally funded airport under 49 U.S.C. 47107(a)(1) is a "liberty interest" protected by the Fourteenth Amendment of the United States Constitution. Mr. Ashton maintains that his "liberty interest" in the use of the public airport is protected by the Fourteenth Amendment of the Constitution in several ways, including a requirement for procedural due process prior to restricting his use to the

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[2] In his Complaint, Mr. Ashton uses the term "eviction" to describe the termination of his Aircraft Storage Permit. However, the City consistently uses the term "termination." For clarity of the record, both terms shall be deemed to indicate an involuntary removal from a leased-public T-hangar at the Concord Regional Airport.

Airport. Mr. Ashton contends that his rights under the Fourteenth Amendment have been violated because the Respondent has failed to provide for procedural due process prior to restricting his use of the Airport.

II. THE AIRPORT

Concord Regional Airport is a public-use, general aviation airport located in Cabarrus County, North Carolina, approximately 7 miles west of Concord, North Carolina. The City of Concord owns the Airport. The Airport has approximately 88 based aircraft and 55,250 operations annually at the Airport. [FAA Exhibit 1, Item 1, Airport Master Record]

Concord Regional Airport opened in 1994 as a reliever airport to Charlotte/Douglas International Airport. The development of the Airport has been financed, in part, with funds provided to the City as the Airport sponsor under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, et seq., and as administered by the State of North Carolina in the State Block Grant Program. [FAA Exhibit 1, Item 2, Grant History]

III. ISSUES

A review of the Complainant's allegations found in the record raises the following issues for FAA consideration:

(1) Whether the Respondent, by terminating the Complainant's Aircraft Storage Permit for use of public T-hangar facilities at the Concord Regional Airport, is in violation of 49 U.S.C. 47107 (a)(1) and FAA grant assurance

#22 regarding reasonable access to a public use airport without unjust economic discrimination.

(2) Whether the Respondent violated Complainant's due process liberty interests as protected by the Fourteenth Amendment of the United States Constitution.

Our consideration of this matter is based solely on a review of the arguments and supporting documentation listed in the administrative record [FAA Exhibit 1] and the applicable Federal law and FAA policy prohibiting a sponsor from practicing unjust economic discrimination, and unreasonably denying access.

With respect to the allegations presented in this Complaint, under the specific circumstances at the Concord Regional Airport as discussed below, and based on the evidence of record in this proceeding, we find that the City is not currently in violation of its Federal obligations.

IV. APPLICABLE LAW AND POLICY

The Federal Aviation Act of 1958, as amended (FAAct), 49 U.S.C. Section 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. The Federal role in encouraging and developing civil aviation has been augmented by various legislative actions that authorize programs for providing finds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance

instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance as well as ensuring the public reasonable access to the airport. Pursuant to 49 USC § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their sponsor assurances.

FAA Order 5190.6A, Airport Compliance Requirements, (hereinafter Order) provides policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances.

The Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under the AAIA, the Secretary of Transportation receives certain assurances from the airport sponsor.

The AAIA, 49 USC § 47107(a), et seq., sets forth requirements to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance. These sponsorship requirements are included as assurances in every airport improvement grant agreement. Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the Federal government.

Airport Owner Rights and Responsibilities

Assurance 5, "Preserving Rights and Powers," of the prescribed sponsor assurances implements the provisions of the AAIA, 49 USC Section 47107(a), et seq., and requires, in pertinent part, that the sponsor of a federally obligated airport "will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor."

FAA Order 5190.6A, Airport Compliance Requirements, (Order) describes the responsibilities under Assurance 5 assumed by the owners of public-use airports developed with Federal assistance. Among these is the responsibility for enforcing adequate rules, regulations, or ordinances as are necessary to ensure the safe and efficient operation of the airport. See Order, Secs. 4-7 and 4-8.

Use on Reasonable and Not Unjustly Discriminatory Terms

Assurance 22, "Economic Nondiscrimination," of the prescribed sponsor assurances implements the provisions of 49 U.S.C. 47107(a)(l) through (6), and requires, in pertinent part, that the sponsor of a federally obligated airport:

"...will make its airport available as an airport for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport." Assurance 22(a)

"...may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport." Assurance 22(h)

"...may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." Assurance 22(i)

Subsection (h) qualifies subsection (a), and subsection (i) represents an exception to subsection (a) to permit the sponsor to exercise control of the airport sufficient to preclude unsafe and inefficient conditions, which would be detrimental to the civil aviation needs of the public.

FAA Order 5190.6A describes the responsibilities under Assurance 22 assumed by the owners of public use airports developed with Federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on reasonable terms without unjust discrimination. See Order, Secs. 4-14(a)(2) and 3-1.

The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities. See Order, Sec. 3-8(a).

The owner of any airport developed with Federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds and classes of aeronautical activity on reasonable terms, and

without unjust discrimination. See Order, Sec. 4-13(a).

The FAA Airport Compliance Program

The FAA discharges its responsibility for ensuring airport sponsor compliance with Federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on the contractual obligations, which an airport owner accepts when receiving Federal grant funds or the transfer of Federal property for airport purposes. These obligations are incorporated in grant agreements and instruments of conveyance in order to protect the public's interest in civil aviation and to ensure compliance with Federal laws.

The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' Federal obligations and the public's investment in civil aviation. The Airport Compliance Program does not control or direct the operation of airports; rather, it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that the public interest is being served.

FAA Order 5190.6A sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather it establishes the policies and procedures to be followed by FAA personnel in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA

personnel in interpreting and administering the various continuing commitments made to the United States by airport owners as a condition for the grant of Federal hinds or the conveyance of Federal property for airport purposes. The Order, inter alia, analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of these assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

V. BACKGROUND

Procedural History

A. Prior Complaint, 16-99-09

On July 12, 1999, Kent J. Ashton filed a formal complaint (FAA Docket No. 16-99-09), separate and before this proceeding, pursuant to 14 CFR Part 16, alleging that the City of Concord, as sponsor of the Concord Regional Airport, had violated its airport grant agreements and had engaged in economic discrimination and in granting of an exclusive right. The complaint alleged that the City violated FAA grant assurances by: knowingly and willfully discriminating against his type, kind, or class of aeronautical use; operating to prevent him from performing services on his own aircraft; knowingly and willfully, through a system of rules, regulations, lax enforcement, selective enforcement and special concessions, operating to restrict use of the Airport to favored types, kinds, or classes of aeronautical use; requiring him to carry liability insurance for use of the Airport; requiring him to make the City an additional insured on his liability insurance coverage; requiring him to waive rights to recover damages against the City before being permitted to base an aircraft at the Airport; and prohibiting

tenants of T-hangars from storing more than one aircraft in the hangar. [FAA Exhibit 1, Item 8 Director's Determination, FAA Docket No. 16-99-09]

On January 28, 2000, the FAA issued a Director's Determination, Docket No. 16-99-09, finding that the Concord Regional Airport was not in violation of its grant assurances pursuant to 49 U.S.C. section 40103(e) and 49 U.S.C. section 47107(a)(l) through (6). The Director considered the following issues raised by the Complainant in that prior Complaint: (i) Whether the City's regulations, standards or facilities constituted an unreasonable denial of access; (ii) Whether the City's rules, rules, regulations, enforcement thereof, and allegedly disparate facilities create unjust economic discrimination by preferring some similarly situated aeronautical users over other aeronautical users; and (iii) Whether the City has bestowed and exclusive right to two private operators by providing increased convenience for the conduct of self-maintenance within a leased hangar, as well as bestowing an exclusive right for the Airport's Fixed- base operator (FBO) by effectively prohibiting self-service for some. With respect to the allegations presented in Mr. Ashton's Complaint under FAA Docket No. 16-99-09, based on the record evidence in that proceeding, we found that the City, as the airport sponsor, was not in violation of its Federal obligations. [FAA Exhibit 1, Item 8]

On February 24, 2000, Mr. Ashton filed an appeal of the Director's Determination regarding his previous Complaint, (Docket No. 16-99-09), with the FAA's Associate Administrator for Airports. In his appeal, Mr. Ashton alleged that "...the Director made procedural errors in the conduct of the investigation and substantive errors in interpreting the evidence and making conclusions from the evidence." [Final

Agency Decision, FAA Docket No. 16-99-09, Exhibit 1, Item 9]

On July 3, 2000, the Associate Administrator issued a Final Agency Decision with respect Mr. Ashton's previous Complaint, FAA Docket No. 16-99-09, affirming the Director's Detennination of January 28. The Associate Administrator determined that ". . . the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent and FAA policy." [FAA Exhibit 1, Item 9, p. 23]

On August 30, 2900, Mr. Ashton filed a petition for review of the Final Agency Decision in the first proceeding (16-99-09) with the United States Court of Appeals for the 4th Circuit.[3]

B. Present Complaint (16-00-01)

On January 28, 2000, Kent Ashton filed a second Complaint (FAA Docket No. 16-00-01), which commences the instant proceedings. [FAA Exhibit 1, Item 3]

On February 17, 2000, the FAA issued a Notice of Docketing advising that it was docketing the instant Complaint. [FAA Exhibit 1, Item 4]
Notwithstanding the fact that Mr. Ashton's instant Complaint (FAA Docket 16-00-01) contained many of the same issues as his previous complaint (FAA

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[3] The Department of Justice, representing the FAA, did not object to a motion made by Mr. Ashton to the U.S. Court of Appeals for the 4th Circuit to hold his petition regarding FAA Docket No. 16-99-09 in abeyance until such time as all administrative remedies regarding the instant complaint (FAA Docket No. 16-00-0 1) have been exhausted. The Court has not yet ruled on Mr. Ashton's request.

Docket No. 16-99-09), the FAA docketed the instant complaint primarily because the Respondent's termination of Mr. Ashton's Aircraft Storage Permit was not at issue in Mr. Ashton's previous complaint.[4]

On March 17, 2000, the City filed an Answer and Motion to Dismiss to the instant Complaint, FAA Docket No. 16-00-01. [FAA Exhibit 1, Item 5]

On March 27, 2000, Ashton filed a Reply to the City's Answer to the instant Complaint, FAA Docket No. 16-00-01. [FAA Exhibit 1, Item 6]

On April 12, 2000, the City filed a Rebuttal to Ashton's Reply to the instant Complaint, FAA Docket No. 16-00-01. [FAA Exhibit 1, Item 7]

Factual Background

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[4] Insofar as the FAA has previously determined the allegations in the Mr. Ashton's instant complaint (FAA Docket No. 16-00-01) in his previous complaint (FAA Docket No. 1699-09), as discussed more fully below, the Respondent's Motion to Dismiss is granted. In the instant complaint (FAA Docket No. 16-00-01), Mr. Ashton argues that: (i) the City's verbal directives to, among other things, "not enter any area not required for his aviation activity" were unjustly discriminatory, did not apply to all users, and were not necessary for safety and efficiency and were confUsing in nature; (ii) the Sponsor is under the misconception that it has an unfettered right to deny access to individuals, to make and enforce unwritten mles to restrict access and to allegedly arbitrarily deny access to the public; and (iii) his entry into Hangars- In-Common to speak with pilots, mechanics and other members of the public in those hangars, or to take a photograph was an aeronautical use of the airport and not unlawfUl. These issues were adjudicated in the prior administrative proceeding (FAA Docket No. 16-99-09) -- Final Agency Decision, p.25 -32, issued July 3, 2000;[FAA Exhibit I, Item 9J and Director's Determination, "Analysis" section, p. 25- 32; issued January 28, 2000 [FAA Exhibit I, Item 8].

This section describes the facts relevant to the instant complaint (FAA Docket No. 16-00- 01) after review of the information presented in the record.

On July 7, 1998, the Complainant signed an Aircraft Storage Permit[5] for the Concord Regional Airport. This Permit contained a provision (Para. 10) that allowed the City or the Permittee to cancel the lease for any reason with ten (10) days written notice. In addition, the Permit states that the Permittee shall have 10 days from receipt of a notice of termination of the Permit within which to file an appeal to the Aviation Director. [FAA Exhibit 1, Item 3, exhibit Q]

In a letter dated December 21, 1999, the City terminated the Complainant's Permit to the T-hangar at the Concord Regional Airport, effective December 31, 1999. This letter also provided for an appeal of the termination within 10 days as stated in the Permit. [FAA Exhibit 1, Item 3, exhibit G]

In its Reply, the City stated that the reason for the termination is that the Complainant, under the guise of collecting information concerning the Airport, photographed, bothered and harassed other tenants at the Airport beginning on or about January 1, 1999.

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[5] While Mr. Ashton indicates that he signed an Aircraft Storage Permit, the City, in its Answer and Rebuttal, refers to the Aircraft Storage Permit as a lease. The City admits that it terminated the lease agreement, and in doing so, references a letter dated December 21, 1999. [FAA Exhibit 1, Item 5, exhibit 1] This letter advises Mr. Ashton that his Aircraft Storage Permit will be terminated within 10 days from the date of the letter. Consequently, the FAA accepts that the both the Complainant and Respondent, while using different terms, are both referring to the "Aircraft Storage Permit" signed by Mr. Ashton on July 7, 1998. [FAA Exhibit I, Item 3, ExhibitQ]

[FAA Exhibit 1, Item 5, page 1] Additionally, the City contends that the Complainant used the Airport for non-aeronautical purposes and entered areas of the Airport that he knew he was not to enter. [FAA Exhibit 1, Item 5, page 3, para. 17]

According to the City, "... on numerous occasions ... employees at CRA, as well as officers with the Concord Police Department, limited Mr. Ashton's access at the Airport to those portions of the restricted area at CRA necessary for Complainants' use and enjoyment of his aircraft due to his bothering and harassing other tenants." On September 20, 1999, after being notified by Airport authorities that he was in an area of the airport where he had no business, and after the Concord Police were called, and asked him to leave the area of the Airport that he was in, and after he refused to leave, Mr. Ashton was cited for trespassing by the Concord Police Department. [FAA Exhibit 1, ItemS, page 3, para. 19]

Mr. Ashton admits that the City terminated his Permit to the T-hangar on December 21, 1999. The notice of termination informed the Complainant of his appeal rights. The Complainant also admits that he sometimes entered the airfield solely for the purpose of observing airfield activities and talking with other tenants and that he "photographed tenants without their permission and that the process was unpleasant and bothersome for all parties involved." However, Mr. Ashton contends that "So long as the Complainant, or any member of the general public, is able to move about the airfield safely...he must be allowed to proceed." [FAA Exhibit 1, Item 3, pgs 2-4]

On September 20, 1999, after being asked to leave an area of the Airport, Complainant was cited for

trepassing by the Concord Police Department. Subsequently, Complainant was convicted of trespassing by the Cabarrus County District Court. [FAA Exhibit 1, Item 3, page 2; FAA Exhibit 1, Item 5, page 4].

On December 28, 1999, the Complainant wrote to Gordon Belo, City Attorney, and requested additional information on the conduct of the hearing as identified in the December 21st notice of termination of his Permit and proposed that an FAA official from the FAA's Southern Region Airports Division be designated as a hearing officer. [FAA Exhibit 1, Item 3, exhibit H]

On December 29, 1999, James Greene, Jr., Assistant City Manager for Operations, responded to the letter the Complainant wrote to Gordon Belo and stated that "The Concord Regional Airport will not agree to utilize a representative of the FAA as the hearing officer on your appeal...I have also received a copy of your December 25th letter to Mr. Hiatt purportedly seeking a "mediation" of your eviction pursuant to FAA regulations in lieu of a hearing. Those regulations have no bearing on the current matter. The hearing will proceed." This letter also changed the date of the hearing for the Complainant's convenience to January 5, 2000. [FAA Exhibit 1, Item 3, exhibit K]

On December 30, 1999, the Complainant wrote to James Green [sic] and noted five (5) specific objections with regard to the hearing concerning his eviction. [FAA Exhibit 1, Item 3, exhibit I] The Complainant especially noted that he believed that the City was not proceeding according to the published Concord Regional Airport Operations Code regarding arbitration.

On January 10 2000, G. Tim Lowder sent a letter to the Complainant regarding the City's determination on the Appeal Hearing for Aircraft Storage Permit Termination. This letter established that a hearing was conducted with Mr. Ashton present concerning the notice of termination of Mr. Ashton's Permit, and that the hearing officer upheld the termination. However, Mr. Lowder noted that the Complainant would continue to have the right to use portions of the Airport for the general aviation public. [FAA Exhibit 1, Item 3, exhibit L]

On January 18, 2000, the Complainant filed a Complaint and Motion for Temporary Restraining Order in the state court (General Court of Justice) to stay the hangar eviction. In his request for the Order, Ashton alleged that (a) the Airport hearing was not conducted in accordance with the Concord Regional Airport Operations Code, Section V. (b) that the City is a party in opposition to the Complainant in a [Part 16] proceeding, (c) that the hearing officer is an employee of the City and not a neutral third-party, (d) the hearing was an ad hoc proceeding with the City refusing to specify any rules of procedure, rules of evidence, nor did the City notify Complainant of any grounds for eviction or evidence supporting eviction, (e) Complainant nominated an official of the FAA to be a neutral hearing officer, but was refused by the City. [FAA Exhibit 1, Item 5, exhibit 9]

On January 19, 2000, John Crosby, Aviation Director, sent a letter to the Complainant stating that because he had failed to remove his property from the T-hangar, the hangar had been secured with a padlock to secure the property and to exercise the City's right to take possession of the hangar. [FAA Exhibit 1, Item 3, exhibit N]

Also on January 19, 2000, the Complainant sent a letter to W. Brian Hiatt, City Manager, stating that "As you are aware, I believe the City's eviction of me and the aircraft owned by my wife and I from your public airport as well as your interpretation of the law governing access to the public airfield are violations of various N.C. statutes. Accordingly, I decline to vacate the public hangar as you requested." [FAA Exhibit 1, Item 3, exhibit 0]

On February 29, 2000, the Honorable Richard D. Boner, Superior Court Judge Presiding, denied the Motion for a Temporary Restraining Order for failure to state a claim. [FAA Exhibit I, Item 5, exhibit 11]

V. [sic] ANALYSIS AND DISCUSSION

The Complaint generally alleges that the City is operating the Airport in a manner inconsistent with its Federal obligations to make the airport available for aeronautical use on reasonable and not unjustly discriminatory terms and conditions. Specifically, the Complaint alleges that the City's eviction from

public hangar facilities and infringement on his right to access and use the public airfield violates the provisions of 49 U.S.C. 47107(a)(1). The Complaint also alleges that the right to use a Federally funded airport under 49 U.S.C. 47107(a)(1) is a "liberty interest" protected by the Fourteenth Amendment of the United States Constitution. According to the Complainant, the Respondent is violating his rights under the Fourteenth Amendment by failing to provide for procedural due process prior to restricting his use of the Airport.

Reasonable Airport Access

The Complainant alleges that his eviction from City-owned T-hangars and infringement on his right to access and use the public airfield is a violation of 49 U.S.C. 47107(a)(l), that is, that the airport will be available for public use on reasonable terms and conditions. [FAA Exhibit 1, Item 3, page 2]

In its Answer, the City admits that it has terminated the Complainant's permit to the T- hangar but denies that it has prohibited Complainant from utilizing the Concord Regional Airport (CRA). The City states that "Complainant has the same right as any other non-tenant to use the facilities at CRA." [FAA Exhibit 1, Item 5, page 2]

Grant Assurance 22, "Economic Nondiscrimination" implements the provisions of 49 U.S.C. § 47107(a)(l) through (6). One aspect of compliance with Grant Assurance 22(a), is that a sponsor "will make the airport available as an airport for public use on reasonable terms. . . to all types, kinds and classes of aeronautical activities." However, as stated in the Applicable Law and Policy Section above, Assurance 22(h) allows the sponsor to "establish such reasonable . . . conditions to be met by all users

of the airport as may be necessary for the safe and efficient operation of the airport."

Airfield Access

Although it is apparent from the record that Mr. Ashton is no longer permitted the privilege of storing his aircraft in a City-owned T-hangar at the Airport, the FAA is not persuaded that the Respondent has denied the Complainant access to the public airfield. In his complaint, Mr. Ashton provides a letter dated January 10, 2000, from the Assistant City Manager (hearing officer), which states that ". . . he [Mr. Ashton] will no longer have a property right to use a T-hangar. It does not mean that he [Mr. Ashton] no longer has a right to use the portions of the facility available for general aviation public." In its Rebuttal, the City affirms the January 10 letter by stating that "Ashton has the same rights as any other non-tenant to use the facilities at CRA. He may take-off and land, he may drop-off and pick-up passengers, he may have his aircraft serviced, and he may fuel his aircraft. There has been no attempt to prevent [Mr.] Ashton from using the Airport in the same manner as any other non-tenant." [FAA Exhibit I, Item 7, page 2]

Mr. Ashton provides no evidence that the City has attempted to prevent him from using the airport as a non-tenant.

T-Hangar Aircraft Storage Permit

Mr. Ashton asserts that the City required him to sign an Aircraft Storage Permit as a prerequisite to taking constructive possession of the T-hangar and he would not have been permitted to store an aircraft unless he agreed to the conditions in the Permit. Mr. Ashton contends that the Permit contains a "non-

voluntary lease termination provision that "works to deny public access to the Airport facilities" and is exercisable at the "whim" of the City. Mr. Ashton argues that the "non-voluntary lease termination provision" is a contract provision established against the Grant Agreement, as well as North Carolina General Statutes and public policy of the state of North Carolina. [FAA Exhibit 1, Item 3, p. 3]

Mr. Ashton, in his complaint, also stated that he believes that the "cause" the Sponsor will cite for evicting him will include (1) entering the airfield for non-aeronautical purposes, (2) entering areas he knew, or should have known, were unauthorized, and (3) harassing and bothering other tenants. Mr. Ashton admits that he sometimes entered the airfield solely for the purpose of observing airfield activities and talking with other tenants. [FAA Exhibit 1, Item 3, p. 3] Mr. Ashton also admits that on or about April 7, 1999, and on several occasions thereafter, the Airport authorities gave him various verbal instructions to, among other things, "not enter any area not required for his aviation activity," [FAA Exhibit 1, Item 3, p. 4] and on September 20, 1999, the Aviation Director caused him to be charged, and subsequently convicted of criminal trespass. [FAA Exhibit I, Item 3, p. 6] However, Mr. Ashton argues that the City's restrictions were unreasonable because they were not necessary for the safe and efficient operation of the airport, confusing, ambiguous, open to interpretation, and contradictory in nature. [FAA Exhibit 1, Item 3, p. 5] According to Mr. Ashton, his observations and speech were lawful and consistent with the right of the general public to observe the operation of a public enterprise and such activities by the Complainant fall under the umbrella of fair and reasonable use, whether or not such use is aeronautical. [FAA Exhibit 1, Item 3, p. 3]

In its answer to the complaint, the City admits that it required Mr. Ashton to sign a Lease in order to occupy a T-hangar [FAA Exhibit 1, Item 5, p. 1]; admits that the Lease contains a provision which allows Complainant or the City to terminate the Lease without cause upon ten (10) days notice; and denies that the Lease is in violation of the Grant Assurances, North Carolina Statutes, or the public policy of the state of North Carolina. [FAA Exhibit 1, Item 5, p. 3]

The City argues that even though the Lease may be terminated without cause, the Complainant's conduct provides more than sufficient cause for termination of the Lease, including, but not limited to, (1) Complainant's use of the Airport for non-aeronautical purposes; (2) entering areas of the Airport which he knew he was not to enter, and (3) harassing and bothering other tenants. [FAA Exhibit 1, Item 5, p. 3] The City contends that on September 20, 1999, after being notified by Airport authorities that he was in an area of the airport where he had no business, and after the Concord Police were called and asked Mr. Ashton to leave the area of the Airport that he was in, and after Mr. Ashton refused to leave, he was cited for trespassing by the Concord Police Department. [FAA Exhibit 1, Item 5, p.4]

The City denies that the Airport Rules and Regulations are in any way discriminatory; that the rules have been enforced only against Mr. Ashton or that the verbal directives made necessary by Mr. Ashton's behavior were in any way vague or subjective. [FAA Exhibit 1, Item 5, p. 4] The City further argues that the issues raised by this Complaint have been dealt with and dismissed by the

FAA in Complainant's previous FAA complaint. [FAA Exhibit 1, Item 5, p. 7]

In his Reply, the Complaint asserts that the right to use a Federally funded airport under 49 U.S.C. 47107(a)(1) is a "liberty interest" protected by the Fourteenth Amendment of the United States Constitution, and as such the FAA is empowered to act based on constitutional law. Mr. Ashton maintains that his "liberty interest" in the use of the public airport is protected by the Fourteenth Amendment of the Constitution in several ways, including a requirement for procedural due process prior to restricting his use to the Airport [sic]. Mr. Ashton argues that because the City refused to (1) to follow its own published procedures for a Board of Arbitration to hear the appeal of his eviction, and (2) employ a neutral third party to hear his appeal, his right to due process under the Fourteenth Amendment to the Constitution was violated.

The Complainant argues that a careful reading of the record, including his previous complaint (FAA Docket No. 16-99-09) will demonstrate that the Respondents conducted an escalating series of retaliation in reaction to Complainant's lawful investigation of Airport matters. Mr. Ashton alleges that this retaliation is an infringement on his constitutional rights to petition the government and a violation of the due process clause. [FAA Exhibit 1, Item 6]

According to Mr. Ashton, 14 CFR Section 16.1(a) states that the Part governs all proceedings involving Federally-assisted airport, specifically with regard to 49 U.S.C. 47107(a)(1). He further argues that if a Complainant can demonstrate a violation of constitutional law with regard to the

federal statute, the FAA is empowered to act. [FAA Exhibit 1, Item 6, page 1]

In it's Rebuttal to Complainant's Reply, the City states that "The Reply filed by Ashton does not address points raised by the City in it's Answer but instead puts forth an entirely new argument that the actions undertaken by the City are unconstitutional. The issues raised in the Reply are also outside of the jurisdiction of the FAA. The City argues that the FAA has previously held that consideration of constitutional issues are not within the jurisdictional limits of 14 CFR § 16, citing Martin v. City of Prescott, Docket No. 16-97-01 " [FAA Exhibit 1, Item 7, page 1]

Before addressing the reasonableness of the Aircraft Storage Permit's "non-voluntary termination provision," it is necessary to dispose of several related issues for which the FAA has no jurisdiction and/or issues that the FAA has addressed in deciding Mr. Ashton's previous complaint (FAA Docket No. 16-99-09). Specifically, as discussed above, Mr. Ashton maintains that his actions at the Airport were lawful notwithstanding his criminal trespass conviction.

The FAA's administrative complaint process for matters pertaining to federally assisted airports is not the proper forum for review of Complainant's claims of violations of constitutional, state, or local laws. Under 14 CFR Part 16.1, the FAA's jurisdiction is specifically limited to proceedings involving complaints against federally assisted airports arising under legal authority including portions of the Federal Aviation Act of 1958, as amended, 49 USC 40101, et seq.; the Airport and Airway Improvement Act (AAIA) of 1982, as amended and recodified at 49 USC 47107, et seq.; the

Surplus Property Act, as amended, 49 USC 47151, et seq.; predecessors to those acts; and regulations, grant agreements, and documents of conveyance, pursuant to those Acts.

As admitted by Mr. Ashton, on September 20, 1999, Airport Authorities identified him to police as a trespassser on the airfield. On December 15, 1999, the Complainant was convicted of criminal trespass in a North Carolina District I 9A Criminal Court, and the matter is on appeal in the Superior Court. [FAA Exhibit 1, Item 3, p. 6] Theses courts are the appropriate forum in which to decide alleged violations of North Carolina statutes and City of Concord local ordinances. Such matters are not within the FAA's authority to decide.

Likewise, we disagree with Mr. Ashton's assertion Part 16 is an appropriate forum for alleged violations of constitutional law. The FAA previously addressed this issue in its initial determination of Martin v. City of Prescott, AZ, FAA Docket No. 16-97-0 1 (July 23, 1997), "Because of the jurisdictional limitations of 14 C.F.R. 16, it would not be appropriate for the FAA . . . to include a determination of whether or not the Aircraft Storage Facility Agreement violates the Fourteenth Amendment of the United States Constitution . . .." On appeal, the FAA Associate Administrator for Airports affirmed the FAA's initial determination of Martin v. City of Prescott, concluding, among other things, ". . . it is the courts, not the FAA, a federal agency, that is the appropriate forum for . . . constitutional claims." (Prescott, 16-97-01 October 7, 1997).

Finally, the FAA has already addressed Mr. Ashton's assertion that his observations were fair and reasonable use of the airport and therefore

protected by Assurance 22(a) in his previous complaint filed with the FAA (Docket No. 16-99-09). In that proceeding, Mr. Ashton filed a Motion for a Cease and Desist Order that sought to have the FAA prohibit the City from limiting the Complainant's access at the Airport. In deciding that Complaint, the FAA concluded that

> . . . The FAA's authority over Complainant's access to the Airport is limited to his use of the Airport as an airport. See grant Assurance #22. The FAA accepts that violations of state or local law by an individual, and subsequent prosecution, might have the effect of restricting his or her ability to conduct aeronautical activities. Providing protection to an individual from the consequences of his or her nonaeronautical activity, such as being cited for trespassing, is not the responsibility of the Sponsor under the Grant Assurances and is not within the jurisdiction of the FAA. The FAA is satisfied from the statements of the Complainant, summarized in the Background Section, that he conducted nonaeronautical activities on the Airport. These activities appear to have been the subject of state or local court proceedings. The character of the Complainant's nonaeronautical action is not within the jurisdiction of the FAA to determine. Because the record appears to show that the Respondent's concerns involved the Complainant's clearly nonaeronautical use of the Airport, the Complainant's Motion is denied. [FAA Exhibit 1, Item 8, p. 25]

The FAA's initial determination of Mr. Ashton' s previous complaint was subsequently affirmed on appeal to the FAA Associate Administrator for

Airports. The Associate Administrator's decision constituted the Final Agency Decision regarding FAA Docket No. 16-99-09. [FAA Exhibit 1, Item 9] Consequently, the instant Complaint, FAA Docket No. 16-00-01, insofar as it raises the same issues addressed in FAA [sic] Mr. Ashton's previous complaint, FAA Docket No. 16-99-09, is dismissed in part.

Considering the foregoing, the sole issue the [sic] FAA to decide is whether the "non-voluntary lease termination provision," allowing the City to terminate the lease without cause is contrary to the City's Federal obligations. As in all cases, the FAA's interest in a lease and use agreement is confined to its impact on the owner's obligation to the Federal Government. [See FAA Order 5190.6A, par. 6-3] Consequently, it would not be appropriate for the FAA to decide whether the City's Aircraft Storage Permit's [sic] violates North Carolina Statutes and/or public policy of the state of North Carolina, as alleged by Mr. Ashton. The relevant Federal obligation to be considered in this case is the City's obligation to make its airport facilities available on reasonable terms without unjust discrimination. See Grant Assurance #22.

To this end, the FAA finds that the "non-voluntary lease termination provision," by itself, does not establish a violation of Assurance 22. In order to establish a violation of Assurance 22, Mr. Ashton would have to demonstrate that the City exercised the "non-voluntary lease termination provision" for unjust reasons or in an unjustly discriminatory manner. While Mr. Ashton argues that he was evicted in retaliation for the complaints he filed with the FAA, we are persuaded that the City may have had sufficient cause to exercise the lease termination provision at issue. Specifically, the record reflects

that Mr. Ashton was arrested and convicted for criminal trespass at the Airport.

Mr. Ashton's conviction, while not an issue within the jurisdiction under 14 CFR Part 16, supports the City's argument that Mr. Ashton failed to abide by the terms and conditions of his Aircraft Storage Permit. Specifically, Paragraph 4-A of the Aircraft Storage Permit requires that permittees must abide by, among other things, airport rules and local ordinances.

Moreover, we do not find it unreasonable for the City to condition a tenants [sic] right to use hangar facilities on compliance with local laws. In fact, FAA policy encourages such lease provisions. Specifically, FAA Order 5190.6A, par. 4-7(a)(3), states that "*The owners should adopt and enforce adequate rules, regulations, or ordinances as necessary to ensure safety and efficiency of flight operations and to protect the public using the airport.*" The FAA accepts that the City's requirement for all tenants to abide by local ordinances is necessary for the efficient operation of the airport and to protect the public using the airport. The FAA also accepts, as we did in our consideration of Mr. Ashton's previous complaint, that violations of state or local law by an individual might have the effect of restricting his or her ability to conduct aeronautical activities at an airport.

Unjust Economic Discrimination

In order to find a violation of an airport sponsor's Federal obligation regarding unjust economic discrimination with the City's decision to evict Mr. Ashton, the FAA would have to determine that other similarly situated tenants were dissimilarly treated

for violating the terms and conditions of their lease or use agreements for unjust reasons.

Mr. Ashton admits that he has entered the airport to observe the activity of other T-hangar tenants [FAA Exhibit 1, Item 3, p. 3] and to photograph their activities; admits that the process was unpleasant and bothersome for all parties involved [FAA Exhibit 1, Item 3, p. 6]; and admits that on several occasions the Airport authorities gave him various verbal instructions to, among other things, "not enter any area not required for his aviation activity." [FAA Exhibit 1, Item 3, p. 4] Despite these verbal instructions and being notified of his repeated violations, Mr. Ashton chose to continue his pattern of behavior until on September 20, 1999, he was charged, and subsequently convicted of criminal trespass. [FAA Exhibit 1, Item 5, p. 5]

Mr. Ashton has provided no evidence to show that another tenant at the airport had been repeatedly warned of violations of the airport rules and regulations and did not have their T-hangar permit terminated.[6] Accordingly, the FAA can find no unjust economic discrimination with respect to Mr. Ashton's eviction from the T-hangar he occupied.

---

[6] In his previous complaint filed with the FAA, Docket No. 16-99-09, Mr. Ashton presented circumstances of alleged unequal treatment in regards to enforcement of Airport rules and exceptions to standards. For example, Mr. Ashton alleged that other tenants were allowed to conduct aircraft maintenance in their leased hangars whereas he was not allowed the same privilege. As those issues were previously address by the FAA in the proceedings under Docket No. 16-99-09, they will not be addressed in this proceeding except to note that we previously held that incidental noncompliance by Airport users, such as the incidents described in Mr. Ashton's previous complaint, does not constitute a Sponsor's unjust economic discrimination. [FAA Exhibit I, Item 8, p.30]

Order

Upon consideration of the submissions and responses by the parties, and the entire record herein, and the applicable law and policy and for the reasons stated above, the FAA Office of Airport Safety and Standards finds and concludes as follows:

(1) The Respondent, by terminating the Complainant's Aircraft Storage Permit for use of public T-hangar facilities at the Concord Regional Airport, is not in violation of 49 U.S.C. 47107 (a)(l) and FAA grant assurance #22 regarding reasonable access to a public use airport without unjust economic discrimination.

(2) The FAA does not have the jurisdiction to decide the Complainant's alleged violations of the Fourteenth Amendment of the United States Constitution.

Accordingly, it is ordered that:

The Complaint is dismissed.

These Determinations are made under Sections 313(a), 1002(a) and 1006(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 40103(e), 44502, 40113, 40114, 46104, and 46110, respectively, and Sections 511(a), 511(b), and 519 of the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. §§ 47105(b), 47107(a)(1)(2)(3)(5)(6)(7)(8)(17), 47107(g)(1), 47110, 47111(d), 47122, respectively.

RIGHT OF APPEAL

This Director's determination is an initial agency determination and does not constitute a final agency

decision and order subject to judicial review. 14 CFR 16.247(b)(2). A party adversely affected by the Director's determination may appeal the initial determination to the FAA Associate Administrator for Airports pursuant to 14 CFR 16.33(b) within thirty (30) days after service of the Director's determination.

s/J. R. White for
David L. Bennett
Director, Office of Airport Safety And Standards

Date: OCT 16 2000

APPENDIX D

UNITED STATES CONSTITUTION

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

UNITED STATES CODE

[49 U.S.C.] Sec. 40103. Sovereignty and use of airspace

* * *

(e) No Exclusive Rights at Certain Facilities. - A person does not have an exclusive right to use an air navigation facility on which Government money has been expended.

* * *

[49 U.S.C.] Sec. 46110. Judicial review

* * *

(c) Authority of Court. - When the petition is sent to the Secretary or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary or Administrator to conduct further proceedings. After reasonable notice to the Secretary or Administrator, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary or Administrator, if supported by substantial evidence, are conclusive.

* * *

[49 U.S.C.] Sec. 47107. Project grant application approval conditioned on assurances about airport operations

(a) General Written Assurances.--The Secretary of Transportation may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that--

(1) the airport will be available for public use on reasonable conditions and without unjust discrimination;

APPENDIX F

CODE OF FEDERAL REGULATIONS

[14 C.F.R.] § 16.229 Burden of Proof

* * *

(b) Except as otherwise provided by statute or rule, the proponent of a motion, request, or order has the burden of proof.

APPENDIX G

FROM: Kent J. Ashton January 20, 2000
* * *

TO : Office of the Chief Counsel
Attention: FAA Part 16 Airport Proceedings Docket, AGC-610
* * *

AFFECTED PARTY: City of Concord, North Carolina
* * *

SUBJECT: Violations of AIP Assurances by Concord Regional Airport [Second Complaint]

COMPLAINANT'S CERTIFICATION OF ATTEMPTED RESOLUTION

I, Kent J. Ashton, Complainant, hereby certify that I made substantial and reasonable good faith efforts to resolve the disputed matter informally prior to filing this complaint and that there appears no reasonable prospect for timely resolution of the dispute.

I made a good faith effort to resolve the complaint stated herein by delivering an offer to mediate (Exhibit A) accompanied by a discussion of the issues. I attended a hearing held by the Sponsor and discussed the issues with the hearing officer appointed by the Sponsor. The hearing officer, an employee of the Sponsor, supported the Sponsor's actions and the Sponsor's City Manager declined to accommodate further discussion of the matter (Exhibit B, 6th ¶).

BACKGROUND

1. Complainant earlier filed a complaint (Docket No.16-99-09) with the Office of the Chief Counsel with regard to this airport Sponsor (City of Concord, North Carolina). The earlier matter is awaiting an Initial Determination due in approximately two weeks.

2. Complainant has stored his privately owned aircraft in a leased public T-hangar at Concord Regional Airport ("Airport"), since July, 1998 and has been a tenant of the Airport for approximately four of the five years the facility has been open for use.

3. For some time, Complainant has objected to certain management practices of the Sponsor which Complainant believes constitute violations of 49 USC 47107 (a)(1) and Grant Assurances given by the Sponsor. Beginning on or about January 1st, 1999, Complainant began to document activities and management practices at the Airport and speak with other tenants and airport users, with the intention of recording allegedly objectionable management practices for future reference, notifying the Sponsor that such practices were occurring, seeking support from Airport and community users, pursuing negotiations with the Sponsor and, if such negotiations failed, filing a complaint pursuant to 14 CFR §16.

4. The Complainant subsequently wrote a series of letters to the Sponsor and the Airport's Aviation director with regard to certain management issues, asking for consideration, and ultimately laying a groundwork for a future complaint. Most of these letters are included in the earlier Complaint but

several others are newly exhibited here (Exhibits C,D,E,F).

5. As the Airport's Aviation Director became aware of the Complainant's investigations, the Aviation Director began, apparently with the approval of the Sponsor, to restrict and limit the Complainant's access to the public airfield. On or about April 7, 1999 (Exhibit C) and several occasions thereafter, the Airport authorities accused the Complainant of entering unauthorized areas of the airfield and gave various verbal instructions to the Complainant to limit and restrict Complainant's access to the airfield.

6. On September 20, 1999 the Aviation Director caused the Complainant to be charged with criminal trespass upon the airfield. The Complainant subsequently (12 Nov 99) filed a Motion for Cease and Desist order objecting to restrictions and trespass charges, which he expects will be addressed in the upcoming Initial Determination. The Complainant was convicted of trespass in a North Carolina District Court but the matter is on appeal in the Superior Court. This brings us to the present matter.

COMPLAINT

7. In a letter dated December 21, 1999, the City terminated Complainant's lease to the public T-hangar at the Airport effective December 31, 1999, but acknowledged Complainant's right to a hearing with regard to the eviction (Exhibit G).

8. Complainant objected to scheduled hearing (Exhibits H, I) on the following grounds:

a. The hearing was not to be conducted in accordance with Concord Regional Airport Operations Code, Section V "Board of Arbitration", which calls for a board consisting of five disinterested persons (Exhibit J).

b. The City is a party in opposition to Complainant in the earlier, open Part 16 action.

c. The hearing officer, Mr. Lowder, is an employee of the City and not a neutral third-party.

9. Pursuant to FAA Order 5190.6A,¶ 4-8a, the Complainant nominated as a neutral hearing officer and officer of the Charlotte Flight Standards District office or an official of the FAA Southern Region, Airports Division, or other FAA official familiar with airport regulation (Exhibits H, I) but this offer was refused by the City (Exhibit K, 2nd ¶)

5. The Sponsor's Hearing Officer found that the City's termination of Complainant's lease was valid (Exhibit L) and the City notified Complainant to vacate the hangar and also stated he would no longer be allowed to use the airfield (Exhibits B, N).

6. When Complainant replied that the eviction action was unlawful and declined to remove his aircraft (Exhibit O), the Sponsor padlocked the aircraft in its hangar and refused to allow Complainant access to the aircraft and the airfild facilities (Exhibit N). The Complainant was refused entry to the airfield on January 20, 2000.

8. <u>COMPLAINT: The Sponsor's eviction of Complainant from public hangar facilities and infringement on his right to access and use the public airfield is a violation of 49 USC 47107 (a)(1) and Grant Agreement ¶ A-2 (Exhibit P).</u>

9. Under the terms of the Grant Agreement (Exhibit P ,¶A-2 at page 4), the Sponsor agreed to "operate the Airport for the use and benefit of the general public and not deny reasonable access to public facilities by the general public".

10. Complainant contends that the T-hangar facilities at the Airport were constructed, in part or as a whole, with Federal grants and therefore qualify as public facilities within the meaning of the Grant Agreement.

11. The Sponsor's scheme for leasing these T-Hangars to the general public is a "first-come, first-served" arrangement whereby a prospective tenant places his name on a waiting list and tenders a deposit, which reserves his position in line for the next suitable T-hangar. Having complied with this scheme, the Complainant took possession of a T-hangar in July, 1998.

12. However, the Sponsor required the Complainant to sign a Storage Permit Agreement (Exhibit Q) as a prerequisite to taking constructive possession of the T-hangar. The preamble to the agreement states:

"The undersigned Permittee hereby requests space at the above-mentioned Airport in order to park or hangar the airplane described above and in consideration for the request being granted, agrees to the following ..."

* * *

14. This agreement would not be objectionable, except that the Sponsor inserted a condition which violates the terms of the Grant Agreement. The

Sponsor required the Complainant to agree to a non-voluntary lease-termination provision (Exhibit Q, ¶ 10), exerciseable at the whim of the Sponsor. This provision allowed the Sponsor to arbitrarily terminate the rights of members of the general public to use the public hangar facilities. Complainant contends this non-voluntary lease termination provision, subsequently exercised to evict the Complainant from his leased T-hangar, works to deny public access to the Airport facilities, in violation of ¶ A-2 of the Grant Agreement.

* * *

19. Under the terms of the Grant Agreement, all "reasonable" public access must be allowed (Id., ¶ A-2). Although FAA Order 5190.6A, ¶4-8(a)(2) states that "use of airport facilities by the general public may be restricted by vehicular, security, and crowd control regulations", the Sponsor is under a misconception that it has an unfettered right to deny access to individuals, to make and enforce unwritten rules to restrict access and to arbitrarily deny access to the public. First, such rules must apply to all and not be unjustly discriminatory (Exhibit P, Assurance 22h). They must be published according to North Carolina law (N.C.G.S. § 63-53 (2)), and they must be necessary for the safe operation of the airport or necessary for the efficient operation of the airport (Assurance 22i and N.C.G.S § 63-53 et seq). In various verbal directives, the Airport authorities told the Complainant to "not enter any area not required for his aviation activity" (Exhibit C, 2nd ¶), confine activities to those areas "necessary for the use and enjoyment of his aircraft" (Exhibit R, ¶7), not enter any area not "necessary for his use of the airport" (Exhibit R, ¶5), must enter at Gate 6 and go directly to and from his aircraft, and "enter and exit the Airport only through Gate 6 or the main

entrance" (Exhibit R, ¶7), to "go directly to and from his aircraft" but "could use the facilities necessary for the use and maintenance of his aircraft" (Exhibit R, ¶7). These directives were unwritten, they were unjustly discriminatory, they did not apply to all users, and they were not necessary for safety and efficiency. Further, they created a subjective and unknowable standard (only "necessary" activity was permitted) which encouraged arbitrary enforcement, contrary to law (State v Chiapetta (Me) 513 A2d 831 cited in 75 Am Jur 2d, Trespass, § 175). When the Complainant traversed the aircraft parking apron on September 20th, 1999 for business he thought was necessary, i.e, to pay a fee required by the Sponsor for his use of a maintenance area inside the airfield, the Aviation Director charged him with trespass because he had entered an area thought to be unnecessary by the Aviation Director.

* * *

21. Did the Complainant enter areas he knew, or should have known, were unauthorized? In retaliation for criticism of airfield management practices and later, in retaliation for the complaint filed, the Aviation Director began, on April 7th, 1999, to restrict the Complainant's access to the airfield to prevent him from observing further activities and from talking to other tenants. These restrictions were communicated verbally and the Sponsor refused repeated requests to put them in writing (Exhibit C and Exhibit F of Complainant's earlier Cease and Desist Motion). The Sponsor also placed padlocks on pedestrian gates which had been unlocked for the previous three years.

* * *

24. Complainant had a right, license and privilege to enter the fenced area of the airfield by virtue of his storage permit, possession of a code combination to gates to the fenced area, permission to enter given by attendants at the Airport Service Desk and the access guaranteed by public law (N.C.G.S. 63-53, 63-2 and 63-5, and 49 USC 47107 (a)(1) also discussed in 75 Am Jur 2d, Trespass, § 184).

25. Complainant contends that such instructions (i.e. to enter only when "necessary" and use only the facilities that are "necessary") do not constitute an objective or knowable standard whereby the Complainant could have known what conduct was prohibited (75 Am Jur 2d, Trespass, § 173, 175).

26. Such instructions were arbitrary and capricious, the interpretation of what was "necessary" was left to the whim of the Airport authorities, and the verbal instructions were not based on any Airport rule or Municipal ordinance and therefore unlawful (Id. § 219).

27. Complainant contends that upon entering the fenced area of the airfield, as he has already shown he had a privilege to enter, there existed no further barriers, signs, pavement markings, published regulations or other notice required by law to inform the Complainant he was about to enter an unauthorized area.

28. Complainant contends that certain written regulations exist (Concord Regional Operations Code, 01.02, ¶C.6, not exhibited here) which prohibit entry into service and utility rooms, but the Airport authorities do not charge any violation of these written regulations and the Complainant strictly denies entering such rooms and areas.

29. Following the issuance of these ad hoc instructions, Complainant, in writing, challenged the lawfulness of the ad hoc rules orally issued by the Airport authorities and asked for them to be put in writing (Exhibits C and Exhibit F of his earlier Cease and Desist Motion). The City and the Aviation Director refused to respond in writing, leaving their ambiguous rules open to interpretation.
* * *

* * *

31. On December 15, 1999, the Complainant was convicted of this trespass charge in N.C. District 19A Criminal District Court. The Complainant filed oral notice of appeal and is entitled to a trial de novo in Superior Court pursuant to G.S. 15A-1115.

32. Did the Complainant harass or bother other tenants? Complainant denies committing sexual harassment. Otherwise, harassment and bothering do not constitute criminal acts, even if they occurred. The Aviation director states that the Complainant "began to disturb other tenants" (Exhibit R, ¶6). On two or more occasions, the Complainant observed other T-hangar tenants performing maintenance on their aircraft in their leased T-hangars in violation of Storage Permit conditions (Exhibit Q, ¶4b). Since such actions are not permitted by the Sponsor and the terms of the lease agreement are strictly enforced against the Complainant, the Complainant politely stated to these tenants that these maintenance activities appeared to violate the storage permit. Complainant asked the tenant if the tenant agreed with Complainant's interpretation of the storage permit terms, whether the tenant considered such terms reasonable, and if the tenant was interested in joining with the Complainant in seeking a rule

change at the airport. These tenants variously stated that either (1) they did not believe their activities constituted maintenance or (2) they had a relationship with the Aviation Director which permitted such activities. The Complainant photographed these activities and reported them to the Airport authorities, who subsequently directed the tenants to stop what they were doing and admitted that these tenants had violated airport rules (Exhibit W, ¶2). Complainant admits that the process was unpleasant and bothersome for all parties involved, yet he points out that (1) the Airport confirmed the violations and ordered the tenants to cease, (2) these other tenants engaged in unauthorized maintenance activities in violation of their lease agreements, yet they have not been warned, cited or evicted as the Complainant has been, (3) the unlawful activities would not have been detected had it not been for the interest of the Complainant and (4) any harassment or bother felt by these tenants was brought about by their own misdeeds and their embarrassment at being confronted and stopped by the Airport authorities.

The situation is indeed unpleasant. But it was brought about by the Sponsor's unreasonable rules which other tenants seem to find too burdensome to follow, the Sponsor's failure to enforce regulations for all users, the Sponsor's failure to admit that favoritism and selective enforcement exists at its public facility, and the Sponsor's continued failure to take positive action to insure that all tenants obey airport rules.

33. Incredibly to the Complainant, the Aviation Director appears to believe that "taking photographs of person without their permission" (Exhibit R, ¶6) and "talking to persons without their permission" are somehow unlawful or improper acts.

* * *

35. Complainant contends the Sponsor has repeatedly failed to exercise due process. It refused to make any effort to justify its objections to Complainant's airfield use by reference to law. It adamantly refused to answer letters of inquiry (Exhibits C,D,E,F) and refused to negotiate (Exhibit B). It failed to warn the Complainant of what actions were objectionable by reference to law. It failed to rely on its own published rules and regulations and invented rules to fit the situation. It abused its police power. It refused to conduct an eviction hearing in accordance with its own rules. It failed to seek advice from appropriate FAA authorities. It evicted a public user summarily and without reliance on a judicial finding, it impounded Complainant's aircraft without benefit of a court order and it summarily denied the Complainant's use of the entire airfield without a court order. It ignored any rights of the Complainant's wife, a half owner of the aircraft, to operate an aircraft at the airfield or utilize public storage facilities.

* * *

37. The Complainant's wife, Jacquelin R. Ashton, is a one-half owner of Complainant's aircraft, is entitled to the same statutory rights as the Complainant, and no evidence is shown which would cause her to forfeit her individual rights. A suspension of her right to store an aircraft at the Airport is made without cause and without due process.

* * *

This 21st day of January, 2000.

s/Kent J. Ashton
Kent J. Ashton
(Major, USAF, Retired)
Complainant

APPENDIX H

[Complainant's Reply,Exhibit X. *Cf. Ashton v. FAA, et al*, No. 01-1562 (4th Cir. 2001), Certified Record, Item 5, Exhibit X]

Mr. Kent J. Ashton
6270 Lynwood Dr.
Harrisburg, NC 28075

Re: Concord Regional Airport

Dear Mr. Ashton,

I am responding to your February 28 letter addressed to the City Council, in which you demand that the Concord Regional Airport issue you a tie-down permit, as well as your February 25 letter to the Aviation Director requesting that you be placed on a waiting list for a storage permit at the Airport. Please understand that the City of Concord is not obligated to allow the storage of your aircraft at the Airport on any basis. As you appropriately note in your February 28 letter, you are not a transient. The City will not allow you to store your aircraft at the Airport through an attempt to create some sort of long-term "transient" status, as suggested in your letter. Moreover, you will not be issued a tie-down, T-hangar, Hangar in Common, or any other storage permit. Accordingly, the City will not place your name, or your wife's name, on a waiting list for storage at the Airport. The $200 tendered with your February 25 letter will be returned.

Your reference in your February 28 letter to statutes which suggest an obligation on the part of the Airport to store your aircraft is misplaced. Two judges and the FAA have affirmed the appropriate-

ness of the City's position and dismissed your contentions.

As you have been advised on several occasions, you may not access the restricted areas of the Airport. Any unauthorized access by you within the restricted areas will be deemed a trespass. As you have also been advised, you may use the runway, taxiway and terminal at the Airport to take off and land your aircraft, as long as your conduct is consistent with the Airport's Rules and Regulations.

Sincerely,

THE CITY OF CONCORD

BY:s/ Brian Hiatt
Brian Hiatt
City Manager

BH/jq

APPENDIX I

[Complainant's Reply,Exhibit Y. *Cf. Ashton v. FAA, et al*, No. 01-1562 (4th Cir. 2001), Certified Record, Item 5, Exhibit Y]

AFFIDAVIT

NORTH CAROLINA
MECKLENBURG COUNTY

Neil Stewart, being duly sworn, alleges and says as follows:

1. From approximately March 10th, 1997 to approximately August, 1999, I was employed as an Airframe and Powerplant mechanic by Spitfire Aviation, Inc. ("Spitfire"), a fixed base operator located on Concord Regional Airport ("Airport"), Concord, North Carolina. Throughout this period of employment I worked at Spitfire facilitates at the Airport.

2. In conjunction with my employment at Spitfire, I was often called upon to make repairs or adjustments to aircraft based at the Airport. Some of these aircraft were hangared in Hangars-in-Common or individual leased T-Hangars at the Airport.

3. On various occasions with regard to my employment at Spitfire, I performed maintenance on aircraft owned by Airport lessees. On these occasions, which averaged about one a month over the term of my employment, I and other Spitfire mechanics performed this maintenance in the owners' leased hangars, sometimes under the supervision of the owners. Alternatively, if an owner phoned in a request for maintenance service to Spitfire, we would contact the Airport Service Desk to have the Airport staff unlock the owner's hangar for us, so that we could make the repairs in

the owner's hangar. These repairs were made in both individual T-hangars and in Hangars-in-Common.

4. I was aware that lease provisions in force at the Airport prohibited maintenance in leased hangars. I believe that these owners and the Airport staff members who unlocked the hangars were also aware of lease provisions prohibiting maintenance in leased hangars, however we did this type of maintenance work so routinely that it appeared to me the Airport authorities had no objection to such activities. From my point of view, it was easier to make the repairs in the leased hangars, rather than take time move these aircraft to the Airport's Self-Maintenance Facility.

5. On May 29th, 1999, I was directed by my employer, along with a second mechanic, to assist Mr. Sid Morris ("Morris") in removing a propeller from his Waco aircraft for an inspection. We went with Morris to his leased T-hangar and began work under Morris' supervision in the T-hangar. During the course of our work, Mr. Kent Ashton ("Ashton") introduced himself to Morris and told Morris that his, Ashton's, lease agreement did not permit such maintenance in a leased T-hangar and Ashton asked Morris if Morris would be interested in joining with him to seek policy changes at the Airport so that such work could be done by all hangar tenants. Morris said that he had a good relationship with Mr. Crosby, the Aviation Director, and didn't want to do anything to spoil it. Ashton left and returned in a few minutes with a camera and, standing outside the hangar, attempted to take a picture of our maintenance work. Morris became angry and tried to block Ashton's photography. Morris approached Ashton in a threatening manner and appeared ready to take Ashton's camera. Ashton warned Morris that if Morris touched him or his camera, Ashton would charge Morris with assault. Ashton left.

Approximately ten minutes later, an airport employee arrived and told Morris to cease work. Morris left, saying that he was going to talk to Mr. Crosby. By that time, we were nearly finished. When Morris returned, we had finished and we left the hangar.

6. Subsequent to May 29th, I did other work for other tenants in leased hangars and hangars-in-common without objection from the Airport.

s/Neil Stewart
Affiant

Neil Stewart, the affiant, personally appeared before me in the City of Charlotte, Mecklenburg County, North Carolina and having been first duly sworn (or affirmed), according to law, made the above affidavit this 21 day of March, 2000.

s/ A. William Milburn
Notary Public

[SEAL: A. William Milburn, NOTARY PUBLIC, Mecklenburg Co., N.C.]

My commission expires:
March 18, 2003